No. 88-2041-CFX
Status: GRANTED

Title: Everett A. Sisson, Petitioner
v.
Burton B. Ruby, et al.

Docketed:
June 14, 1989

Court: United States Court of Appeals
for the Seventh Circuit

See also:
89-30

Counsel for petitioner: Marwedel,Warren J.

Counsel for respondent: Kopka,Robert J., Carter,Brian R.

Entry	Date	Note	Proceedings and Orders
1	Jun 14 1989	G	Petition for writ of certiorari filed.
2	Jul 12 1989		Brief amicus curiae of Maritime Law Assn. filed.
3	Jul 13 1989		Brief of respondents Burton Ruby, et al. in opposition filed.
4	Jul 19 1989		DISTRIBUTED. September 25, 1989
5	Oct 2 1989	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
6	Jan 2 1990		Brief amicus curiae of United States filed.
7	Jan 3 1990		REDISTRIBUTED. January 19, 1990
8	Jan 22 1990		Petition GRANTED. limited to Questions 1 and 2 presented by the petition. In addition the parties are requested to brief and argue the question of whether or not the Court should reconsider its decision in Richardson v. Harmon, 222 U.S. 96 (1911).
			**********
9	Feb 13 1990		Record filed.
		*	Certified copy of original record received.
10	Feb 15 1990		Record filed.
		*	Certified copy of C. A. Proceedings received.
11	Feb 23 1990		SET FOR ARGUMENT MONDAY, APRIL 23, 1990. (2ND CASE)
13	Mar 6 1990	G	Motion of American Auto, Inc. for leave to file a brief as amicus curiae filed.
12	Mar 7 1990		Brief of petitioner Sisson filed.
14	Mar 8 1990	G	Motion of The Maritime Law Association of the United States for leave to file a brief as amicus curiae filed.
15	Mar 26 1990		Motion of American Auto, Inc. for leave to file a brief as amicus curiae GRANTED.
16	Mar 26 1990		Motion of The Maritime Law Association of the United States for leave to file a brief as amicus curiae GRANTED.
17	Mar 30 1990		CIRCULATED.
18	Apr 2 1990	G	Motion of the parties to dispense with printing the joint appendix filed.
19	Apr 6 1990	X	Brief of respondents Ruby, et al. filed.
20	Apr 6 1990	G	Motion of Hatteras Yachts Division of Genmar Industries, Inc. for leave to file a brief as amicus curiae filed.
21	Apr 6 1990	X	Brief amicus curiae of United States filed.
22	Apr 16 1990		Motion of the parties to dispense with printing the joint appendix GRANTED.
23	Apr 16 1990		Motion of Hatteras Yachts Division of Genmar Industries, Inc. for leave to file a brief as amicus curiae GRANTED.
24	Apr 16 1990	X	Reply brief of petitioner Sisson filed.

No. 88-2041-CFX

Entry	Date	Note	Proceedings and Orders
25	Apr 23 1990		ARGUED.

88-2041

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,
Petitioner,

v.

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. §1333 and Article III, Section 2, of the Constitution.

2. Whether the Limitation of Liability Act 46 U.S.C. §181 *et seq.* provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. §1333.

3. Whether the Extension of Admiralty Act 46 U.S.C. §740 provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. §1333.

LIST OF PARTIES

The parties to the proceedings below were Everett A. Sisson, as owner of the motor yacht the ULTORIAN and the respondents Burton B. Ruby, Fireman's Fund Insurance Company and Port Authority of Michigan City as claimants in the limitation proceeding.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,

Petitioner,

v.

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner Everett A. Sisson respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on January 24, 1989 and March 16, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 867 F.2d 341 (7th Cir. 1989), and is reprinted in the appendix hereto, at 1a, *infra*. The order of the Court of Appeals for the Seventh Circuit denying petitioners petition for rehearing is reprinted in the appendix hereto at 22a, *infra*. The order of the United States District Court for the Northern District of Illinois is reported at 663 F.Supp. 858 (N.D. Ill 1987), and the order denying the motion for reconsideration is reported at 668 F.Supp. 1196 and are reprinted in the appendix hereto at 24a and 36a *infra*, respectively.

JURISDICTION

The petitioner invoked federal jurisdiction under 28 U.S.C. §1333 in the United States District Court for the Northern District of Illinois Eastern Division. The petitioner also based jurisdiction on the Limitation of Liability Act 46 U.S.C. §181 *et seq*. On July 1, 1987 the district court dismissed petitioner's complaint for lack of subject matter jurisdiction which dismissal was affirmed on rehearing on September 25, 1987.

On petitioner's appeal, the Seventh Circuit affirmed the district court on January 24, 1989 finding that there was no subject matter jurisdiction. On March 16, 1989, the Seventh Circuit Court of Appeals denied a petition for rehearing with suggestion for rehearing en banc. The petitioners seek review of the decisions of the Seventh Circuit.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Article III, Section 2, Of The Constitution

The judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction. . . .

28 U.S.C. §1333. ADMIRALTY, MARITIME and prize cases

The district court shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or Maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. §181 *et seq*. LIMITATION OF LIABILITY

See Appendix at 42a.

46 U.S.C. §740. EXTENSION OF ADMIRALTY JURISDICTION ACT

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage

has been done and consummated on navigable water; Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT OF THE CASE

Everett Sisson was the owner of a 56′ yacht known as the M/V ULTORIAN which he docked at Washington Park Marina in Michigan City, Indiana. On September 24, 1985, a fire erupted on board the yacht destroying the vessel and causing damage to the marina and several neighboring boats. It is believed that the fire was caused by a defective washer/dryer unit on board the yacht, the negligent installation of the unit and/or the defective construction of the ventilation system for the washer/dryer unit.

As a result of the fire, claimants asserted claims against Everett Sisson for amounts in excess of $275,000. The value of the ULTORIAN before she was totally destroyed was approximately $600,000.

REASONS FOR GRANTING THE WRIT

It is the contention of the appellant Everett Sisson that the district court had admiralty subject matter jurisdiction because; first, the fire which destroyed the Sisson Yacht and caused damage to the claimants' property was related to a traditional maritime activity; second, because the Limitation of Liability Act 46 U.S.C. §183 *et seq.* provided a separate basis of Admiralty Jurisdiction Act; and, third, because the Extension of Admiralty Jurisdiction Act also provided a separate basis for jurisdiction. The nexus test derived from the *Executive Jet/Foremost* cases provides that the loss must arise from a traditional maritime activity. Here, Mr. Sisson's boat was docked at a marina, and docking is a traditional maritime activity. The fire on a boat engaged in a traditional maritime activity is a hazard which is well known in the maritime world. Other boats and a marina were damaged as a result of the fire. Also, the fire posed a threat to commerce and navigation. Alternatively, the Limitation of Liability Act, 46 U.S.C. §183 *et seq.* or the Extension of Admiralty Jurisdiction Act 46 U.S.C. §740 provides a separate basis for jurisdiction here because all of the requirements of the Acts were met by Mr. Sisson.

The interpretation and application of this Court's decision in *Foremost Insurance Co. v. Richardson*, 457 U.S. 660 (1982) by the 7th Circuit are much too restrictive and also in conflict with the decisions of other circuits (Rule 17.1(a)) and, arguably, with the Constitution.

A. Traditional Maritime Activities Are Not Limited To Situations Involving Commercial Activity And Navigation.

The Seventh Circuit's decision involved the interpretation of the decision of the United States Supreme Court in *Foremost Insurance Co. v. Richardson* 457 U.S. 668 (1982). In its interpretation of the *Foremost* case, the court developed its own test to determine when the district courts had admiralty jurisdiction in tort cases. The court determined that admiralty jurisdiction would be available in "cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially 'disruptive impact' on maritime commerce and (2) involves the 'traditional maritime activity' of navigation." Decision at page 8a. Because this case involved a non-commercial activity, the court determined that the two step analysis for non-commercial activities was necessary to determine jurisdiction.

The court admittedly applied a narrow reading of the phrase "traditional maritime activity" which was the guidepost established by the *Foremost* Court. It limited such activity to cases involving navigation. Decision at page 9a. The court justified this narrow reading by certain language found in the *Foremost* decision. Alternatively, the court noted that even if "traditional maritime activity" was not confined to cases involving navigation, the court determined that the sort of fire on board the Sisson yacht should not be considered a "traditional concern" of maritime law.

The petitioner believes that the test developed by the Seventh Circuit was excessively restrictive and does not reflect the intent of the *Foremost* case in deciding jurisdiction on the basis of the presence of traditional maritime

activities. The two pronged "test" does not represent a fair reading of *Foremost* for two reasons.[1]

First, the test developed by the court places an inordinate amount of emphasis on maritime commerce as a limiting factor to jurisdiction even in cases involving non-commercial activities. The Seventh Circuit had previously used commercial activity as the determining factor for maritime jurisdiction issues before the decision in *Foremost*. *Chapman v. U.S.*, 575 F.2d 147, 1978 A.M.C. 2202 (7th Cir. 1978). This emphasis on maritime commerce was specifically repudiated in *Foremost* and cannot be the primary basis for any test to determine maritime jurisdiction. The court's decision, in effect, will move the law of Admiralty jurisdiction backwards to the days of defining maritime jurisdiction in the pre-*Executive Jet/Foremost* era.

Second, it is clear that the negligent navigation of a pleasure craft on navigable waterways is only one of many actions which have a significant connection with a traditional maritime activity; but it is not the sole, exclusive

---

[1] Even the concurring opinion recognized that the narrow reading of *Foremost* would place "inappropriate restrictions on admiralty jurisdiction in other instances". As noted by the opinion:

> "However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.
>
> Hopefully, before long, the Supreme Court will revisit this quagmire and resolve the current ambiguity generated by the courts of appeals in the wake of *Foremost*.

There was the recognition that other hazards are associated with maritime activities and these included fire. Still, the concurring opinion focused on "maritime commerce" as the primary basis for admiralty jurisdiction.

wrong. The test is whether the wrong has a significant connection with traditional maritime activity and not whether the wrong only involves the negligent operation of a vessel.

In the instant case, THE ULTORIAN was docked at a marina on a navigable waterway, Lake Michigan, at the time of the fire. There can be no question that the mooring or docking of a vessel at a marina, or other dock facility, is a traditional maritime activity. Docks (marinas) serve the various needs of vessels and have done so for centuries. During the course of a sailing season, yachts, such as THE ULTORIAN, are customarily moored or docked at marina facilities when they are not actually in use. Typically, a contract between the vessel owner and the marina owner governs the docking or mooring and the contracts themselves are subject to admiralty jurisdiction. *American Eastern Development Corporation v. Everglades Marina, Inc.*, 608 F.2d 123, 1980 A.M.C. 2011, 2012 (5th Cir. 1979); *English Whipple Sail Yard Ltd. v. The Yawl Art*, 459 F.Supp. 866, 1980 A.M.C. 1104 (W.D. Pa. 1978). Also, as vessels are not always moving, from time to time they need to be moored or docked for repair, rest, convenience or any number of reasons related to the vessels' operation. This does not mean that they have been withdrawn from maritime activity. They are simply in a floating position from which they can be quickly started and taken out to sea. Mooring and docking as traditional maritime activities are clearly evident in the multitude of admiralty cases which involve such activities. Some recent examples of these are found in *Weyerhauser Company v. Vessels ATROPAS, et al.*, 777 F.2d 1344 (9th Cir. 1985); *National Marine Service, Inc. v. Petroleum Service Corp.*, 736 F.2d 272 (5th Cir. 1984); *Hardesty v. Larchmont Yacht*, 1983 A.M.C. 1059 (S.D.N.Y. 1982).

Relying on navigation as the defining element also creates definitional problems, as the panel recognized. Page 13a n. 7. This restricted view will not limit jurisdictional issues but will only cause future confusion and destroy the uniform application of maritime law. However, even if navigation is the only traditional maritime activity which could trigger the maritime jurisdiction of this Court, the ULTORIAN was in navigation at the time of the fire. To find otherwise would be a restricted and unwarranted interpretation of the meaning of "navigation" as demonstrated by the Fifth Circuit Court of Appeals in *American Eastern, supra.*

American Eastern involved two pleasure craft which had been damaged in a fire at a marina. The boats were fully operational and were lifted in and out of the water on a weekly basis by a forklift. The court noted that the purpose of the storage was to obviate storage in salt water with the attendant cost of maintenance (including keeping the boats barnacle free). With regard to the issue of whether a claim against the marina could be plead in admiralty, the Fifth Circuit stated as follows:

> The boats were not withdrawn from navigation. This case is more analogous to those involving docking or wharfage than to those where boats are stored for the winter or laid up for long periods. In recent years, many pleasure boaters who frequently take their boats in and out of the water, as appellees here did, have come to regard dry storage at waterside marinas, from which the boats may be readily taken in and out, as an alternative to tying their boats up at docks or moorings. The boat is readily accessible to the water and can be quickly and easily launched or brought ashore to the storage shed but it is not exposed to deteriorating effects of water or weather. Moreover, in determining whether a vessel has been withdrawn from navigation, one must look at its pat-

> tern of use. Pleasure boats are often tied up a higher proportion of the time than commercial vessels which typically may spend little time in port. Here, the boats in question were used no less than necessary or appropriate for pleasure craft, and the dry storage, incident to regular use, was a substitute for wet mooring or docking. Admiralty jurisdiction has, in the past, changed as "new conditions give new rise to new conceptions and maritime concerns." (Citations omitted.)

608 F.2d at 124-25.

The Fifth Circuit therefore concluded that the fact that the boats were taken in and out of the water almost on a weekly basis did not mean that they were withdrawn from navigation and thus, the claims fell within the admiralty jurisdiction of the Court. *Id.* at 125.[2]

Clearly the facts in this case are even stronger than in *American Eastern*, because THE ULTORIAN was not beached or lifted in and out of the water on a regular basis but was moored in a navigable waterway at a dock in a marina. It was not withdrawn from navigation and was thus involved in a traditional maritime activity at the time of the fire. The fire also caused damage to the marina's dock and other vessels all of which were engaged in a traditional maritime activity.

The decision does not define commercial activity. Is not the operation of a marina a commercial activity? Boats pay rent, buy fuel and provisions, obtain insurance, pay salaries, repair boats, and pay taxes. These goods and services move, as do the boats themselves, in interstate commerce. The test suggested just does not work.

[2] Ironically, the *Foremost* case also originated in the Fifth Circuit and this Court affirmed the decision of the Court of Appeals regarding the correct interpretation of the standard needed to support admiralty jurisdiction.

The Seventh Circuit's opinion also ignores the universal recognition of fire as a classic marine peril. Indeed, according to the Fifth Circuit in a case involving a fire aboard a docked freighter,

> A non-friendly fire [as opposed to a galley stove fire] aboard ship so long as it remains unextinguished is a classic case of marine peril. With flammable materials almost everywhere, passages and spaces where natural convection readily permits a small smoldering to break out in a blazing fury, the history of the sea attests to fire as a cause of some of the most catastrophic of marine disasters. See, the *Morro Castle* and *Texas City Disasters.*

Legnos v. M/V OLGA JACOB, 498 F.2d 666, 670 (5th Cir. 1974), citing *Morro Castle* Disaster: *United States v. Abbott*, 89 F.2d 166 (2d Cir. 1937); *Hyman v. Pottsberg's Ex'rs.*, 101 F.2d 262 (2d Cir. 1939); *Petition of Agwi Navigation and New York & Cuba Mail S.S.*, 1939 A.M.C. 895 (S.D.N.Y. 1939); *New York & Cuba Mail S.S. Co. v. Continental Insurance Company*, 32 F.Supp. 251 (S.D. N.Y. 1940) (fire abroad passenger vessel cause death of over one hundred persons); *Texas City* Disaster: *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir., 1952), *aff'd sub nom., Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (approximately 560 persons killed and much of Texas City destroyed by fires and explosions originating from cargoes of fertilizer on two vessels in Texas City Harbor); *Republic of France v. United States*, 290 F.2d 395 (5th Cir. 1961).

A rule which would distinguish between fires according to whether the vessel is docked or physically "in navigation" when the fire arises, or between whether the source of igni-

tion is maritime or non-maritime, would destroy the uniformity which is the object of the admiralty jurisdiction and ignores the marine perils shared by pleasure and commercial vessels.

The uniform objective of the admiralty jurisdiction is an important concept and has its roots in Article III section 2 of the Constitution in which the federal judiciary was given admiralty and maritime jurisdiction. This has been interpreted by this Court to encompass three different grants of power:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, §8, cl.9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," [citation omitted], and to continue the development of this law within Constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the Constitution.

Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61, *rehearing denied* 359 U.S. 962 (1959).

It is important to maintain the uniformity of admiralty law in order to conform to the Constitutional protection afforded it. The only way this uniformity can be maintained is through the federal judiciary which has historically interpreted and applied federal maritime law and sought to preserve the uniformity. The Seventh Circuit's decision threatens that uniformity by removing from Federal jurisdiction, a whole class of cases based on an unjustifiably narrow reading of this Court's opinions.

B. The Seventh Circuit's Decision Is In Conflict With Other Circuits.

The test developed by the Seventh Circuit is also in sharp contrast with the law in other circuits which generally follow the 5th Circuit test. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied* 416 U.S. 969 (1974); *Drake v. Raymark Industry*, 772 F.2d 1007, 1986 A.M.C. 1965 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1974 (1986); *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 1985 A.M.C. 2317 (4th Cir.) (en banc), *cert. denied*, 106 S.Ct. 351 (1985); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 1986 A.M.C. 731 (11th Cir. 1984); *Edynak v. Atlantic Shipping Inc.*, 562 F.2d 215, 1977 A.M.C. 2477 (3d Cir. 1977); *T.J. Falgout Boats, Inc. v. U.S.*, 508 F.2d 855 (9th Cir. 1974); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1974).

Most recently, the Court of Appeals for the Sixth Circuit even criticized the Seventh Circuit's "indefensibly narrow reading of *Foremost Insurance*." *In re John Young*, 872 F.2d 176 (6th Cir. 1989).

Petitioner recognizes that there are problems with the *Kelly* test factors which do not render an easy solution in all cases. The Fifth Circuit has, for example, recently seemingly added additional criteria to consider in making such decision. *Molett v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987). Yet, all other tests clearly show that flexibility is called for beyond that mandated by the Seventh Circuit's reliance on the element of commerce.

As an example of the flexibility, the four-part test of *Kelley* would confer admiralty jurisdiction here. The petitioner was a boat owner and the claimant-appellees were boat owners at a marina. The vehicles involved were vessels and a vessel dock. The type of injury was the

destruction of vessels at a dock. Docking and mooring are traditional maritime activities. Applying the two-part test of *Smith v. Knowles* 642 F.Supp. 1137 (D.Md. 1986), would also result in jurisdiction. Then you would have the traditional activities of mooring and docking as well as the installation of the washer/dryer in a boat, which boat is distinctly maritime in nature. The second part of the test was also satisfied here because the fire which resulted from the yacht spread to other boats in other docks causing damage that could clearly have hindered the navigation of any other vessels within the harbor. The fire could have spread throughout the marina and into a nearby channel which would then have hindered navigation of commercial vessels.

Petitioner takes the position that the decision in *Foremost* precluded any test which relies on the commercial activity or which limits traditional maritime activities to just navigation. In either situation, admiralty jurisdiction would be inappropriately restricted. While other tests have been utilized to determine what constitutes traditional maritime activities, any determination must be expansive and not restrictive as to do otherwise would destroy traditional notions of admiralty jurisdiction.

C. The Limitation Of Liability Act Provides A Separate Basis Of Admiralty Jurisdiction.

If this Court were to find that there is admiralty jurisdiction, it will be unnecessary to proceed to an analysis of the separate jurisdictional basis provided by the Limitation of Liability Act. However, should this Court agree with the Seventh Circuit's analysis and decision on this point, plaintiff-appellant believes that the Act provides a separate basis for jurisdiction.

The Seventh Circuit determined that a nexus requirement was essential to the applicability of maritime jurisdiction pursuant to the Limitation of Liability Act. However, the conclusion is inescapable that, because the right to limitation under section 189 does not depend on the maritime nature of the liability, jurisdiction under the Limitation Act is not co-extensive with admiralty jurisdiction in tort. According to the interpretation of section 189 in *Richardson v. Harmon*, 220 U.S. 96 (1911) a federal court's admiralty jurisdiction in tort and its admiralty jurisdiction under the Act are necessarily two separate species of admiralty jurisdiction, the latter extending jurisdiction to any and all liabilities arising out of the conduct of the vessel.

The decisions in *Executive Jet* and *Foremost* did not change the meaning placed upon section 189 of the Act as decided by the court in *Richardson*. *Richardson* expressly held that the Limitation Act was intended by Congress to apply to torts even where there was no admiralty jurisdiction in tort. 222 U.S. at 106. *Richardson* did not hold that section 189 of the Act effectively expanded admiralty jurisdiction in tort to cover injuries which originated on navigable waters but were consummated on land. Rather, the *Richardson* court construed an act of Congress as conferring a separate source of admiralty jurisdiction which defendant shipowners might invoke irrespective of the maritime nature of the liability sought to be limited.

Even *Executive Jet* was limited to situations "in the absence of legislation to the contrary". 409 U.S. 274 (citing the Death On The High Seas Act, 46 U.S.C. §761-768). The enactment of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740 also did not change the meaning of

Richardson. The legislative purpose of Congress's enactment of §740 was to overrule the Supreme Court's decision in *Martin v. West*, 222 U.S. 191 (1911) and extend admiralty jurisdiction in tort to such cases. To say that §740 "codified" *Richardson* is to miss the point of both *Richardson* and 46 U.S.C. §740. If *Richardson* and §740 have equal meaning then §740 was unnecessary and this Court handed down contradictory decisions in the same year.

It is urged that this Court reconsider the analysis of the Limitation of Liability Act. The Act provided a separate basis of jurisdiction which should not be compromised or limited in any fashion.

D. The Extension Of Admiralty Jurisdiction Act, 46 U.S.C. §740 Also Provides A Basis For Admiralty Jurisdiction.

The Admiralty Extension Act extends Admiralty jurisdiction to "all cases of damage" to property "caused by a vessel on navigable water" and even if the damage is "consummated on land."

Here, we had damage caused by a vessel on navigable waters. *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1974). The dock involved was an extension of land and covered by the Act. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 83 S.Ct. 1185, *rehearing denied*, 374 U.S. 858, 83 S.Ct. 1863 (1963). The dock was damaged as were other boats moored to the dock. The Act clearly confers jurisdiction.

CONCLUSION

It is respectfully requested that this Court grant the petition for a writ of certiorari for the above stated reasons.

Respectfully submitted,

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APPENDICES

APPENDIX 1

[837 F.2d 341 (7th Cir. 1989)]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 87-2713 and 87-2736

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht, The Ultorian, for exoneration from or limitation of liability,

Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 1991—**Nicholas J. Bua**, *Judge*.

ARGUED MAY 23, 1988—DECIDED JANUARY 24, 1989

Before CUDAHY, RIPPLE and KANNE, *Circuit Judges*.

CUDAHY, *Circuit Judge*. This case presents an intriguing classificatory problem concerning the scope of the federal courts' admiralty jurisdiction. Specifically, we must decide whether a fire aboard a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity.

Everett Sisson owned the Ultorian, a 56-foot pleasure yacht, docked at the Washington Park Marina on Lake Michigan in Michigan City, Indiana. A fire erupted on the vessel, destroying it completely and damaging extensively the marina and several other boats. The fire allegedly

was caused by a defective washer and dryer. The net value of the Ultorian after the fire was $800. The owners of the other vessels and of the marina have made claims for damages in excess of $275,000.

Sisson sought injunctive and declaratory relief in the district court, asserting jurisdiction under 28 U.S.C. § 1333, which provides in part:

> The district court shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Essentially Sisson wishes to limit his liability to the claimants for damages caused by the fire, pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.* The district court dismissed Sisson's complaint for lack of subject-matter jurisdiction.

Sisson moved for reconsideration, alleging that the Limitation of Liability Act provides a separate source of admiralty jurisdiction in this case. The district court denied the motion because, in its view, Sisson introduced a new legal theory which could have, but had not, been raised in the original opposition to dismissal. The court then rejected Sisson's argument on the merits, concluding that the Limitation of Liability Act does not provide an independent basis of federal admiralty jurisdiction. The court held alternatively that, even if subject-matter jurisdiction did exist, Sisson was not entitled to limit his liability for damage caused by a pleasure boat.

For the reasons given below, we affirm the district court's dismissal of the case for lack of subject-matter jurisdiction.

I.

Had this case arisen prior to 1972, it would have fallen within the admiralty jurisdiction. Throughout most of the history of admiralty law in this country, the key criterion distinguishing maritime torts has been whether the action-

able wrong occurred "on navigable waters." The Supreme Court stated the rule in *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866): "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." The present case would clearly have satisfied this "locality test;" it involves a fire that began on board a vessel moored on navigable waters, with resulting damage to other vessels also moored on navigable waters.

This test, however, was changed in 1972 by the Supreme Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). In *Executive Jet* the owners of a jet aircraft invoked admiralty jurisdiction when their airplane crashed in Lake Erie. They alleged that the airport had negligently failed to keep its runway free of birds. The airplane's jet engines ingested the birds, causing the plane to lose power and crash. The tort arguably satisfied the locality test—the birds were ingested over, and the plane crashed in, the navigable waters of Lake Erie. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). Reasoning that the locality test "was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel," *id.* at 254, the Court concluded that locality by itself was an inadequate basis for assuming admiralty jurisdiction over an airplane crash. Writing for a unanimous Court, Justice Stewart held that in the context of aviation, "a significant relationship to traditional maritime activity" must be shown as well, before admiralty jurisdiction could be invoked in tort cases. *Id.* at 268. The Court's new "nexus" test was not satisfied by the mere similarity of problems confronting ships that sink and aircraft that crash in navigable waters. The fact that a "land-based plane flying from one point in the continental United States to another" happened to wind up in the water rather than on land did not provide a significant relationship between the crash and "traditional maritime activity involving navigation and commerce on navigable waters." *Id.* at 272.

Executive Jet left open the question whether the new "nexus" test would apply in non-aviation contexts. Any doubt about this issue was subsequently removed in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a case involving the collision of two pleasure boats on navigable waters. The Court first concluded that all tort actions invoking admiralty jurisdiction must meet the new nexus test requiring a significant relationship with "traditional maritime activity." *Id.* at 673-74. When subsequently defining traditional maritime activity, the Court recognized that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," but refused to require that alleged tortfeasors be "actually *engaged* in commercial maritime activity" before they could assert admiralty jurisdiction. *Id.* at 674-75 (emphasis in original). In the Court's view, the federal interest in protecting maritime commerce "can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct." *Id.* at 675 (emphasis in original).

The Court held that although the boats involved were "pleasure" rather than "commercial" craft, the collision in *Foremost* fell within the federal courts' admiralty jurisdiction:

> The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

Id. (footnote omitted). The Court cautioned, however, that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction." *Id.* at 675 n.5. This seems to us a strong admonition to proceed with great caution in extending the *Foremost* principles.

We are now presented with a case that tests the limits of the developing admiralty nexus doctrine: Does a fire on board a moored pleasure yacht, docked in the navigable

waters of a recreational marina on Lake Michigan, bear a significant relationship to traditional maritime activity? Guidance from the Court on this question is limited to two cases: a collision on navigable waters between pleasure craft, that passes the test, and the crash of a land-based airplane in navigable waters, that fails the test.[1] *Foremost* makes it clear that the distinction between aviation and non-aviation contexts is not the critical issue. However, the existing case law gives little basis for determining under what circumstances an accident involving a vessel, in navigable waters, would lack the requisite nexus with "traditional maritime activity."

One principled approach to delimiting the scope of "traditional maritime activity" might be to look at the original reasons for asserting admiralty jurisdiction over that activity. Most scholars of admiralty law agree that the original purpose of admiralty courts was to establish a uniform body of laws to govern (and to promote) maritime commerce. *See, e.g.*, G. Gilmore & C. Black, *The Law of Admiralty*, §§ 1-1, 1-5 (1975); 7A J. Moore & A. Pelaez, *Moore's Federal Practice* ¶ .190, at 2005-06, ¶ .325[5], at 3606-07 (2d ed. 1988); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 280 (1950);

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[1] We are obviously at an early stage in the development of doctrine here. The definitional boundaries are being refined through the process of inclusion and exclusion in particular cases. *See* E. Levi, *An Introduction to Legal Reasoning* 8-27 (1949) (the "inherently dangerous" concept); Llewellyn, *On Warranty of Quality and Society I & II*, 36 Colum. L. Rev. 699 (1936), 37 Colum. L. Rev. 341 (1937) (the "warranty of quality" doctrine). In both the Levi and Llewellyn analyses, the defining characteristics of doctrinal categories developed, through uncomfortable ambiguity of the sort we face here, rather rapidly. They dealt with areas of tort and commercial law that were integrally involved in the burgeoning industrial and commercial progress of the time. By contrast, the admiralty doctrine involved in this case has had few opportunities for clarification through extension. Thus a detailed discussion of the possibilities left open by existing Supreme Court opinions in the area is required.

Stolz, *Pleasure Boating and Admiralty*: Erie *at Sea*, 51 Calif. L. Rev. 661, 667 (1963). However, in *Foremost* Justice Marshall rejected efforts to limit the admiralty jurisdiction to cases involving commercial shipping:

> [P]etitioners' argument that a substantial relationship with commercial maritime activity is necessary because commercial shipping is at the heart of the traditional maritime activity [that admiralty jurisdiction seeks to protect] . . . is premised on the faulty assumption that, absent this relationship with *commercial* activity, the need for uniform rules to govern conduct and liability disappears . . . .

Foremost, 457 U.S. at 674. Thus admiralty jurisdiction is not precluded in the case before us simply because the tort involves pleasure, rather than commercial, vessels.

Another approach would be to analyze the types of instrumentalities and accidents involved in each case in order to determine their relationship to traditional maritime activities. This is, in part, the direction taken by the district court opinion in this case, which paid close attention to the fact that the fire in question allegedly started in a possibly defective washer-dryer unit: "While it may be true that laundering is often performed on ships, the operation of a washer and dryer is not central to the operation of a vessel. . . . That rags used for vessel maintenance were being washed does not provide much of a maritime flavor." *Sisson v. Hatteras Yachts*, No. 87 C 0652, mem. op. at 5-6 (N.D. Ill. Oct. 13, 1987).

We believe that the precise source of a fire aboard a vessel should not carry great weight in determining whether the tort is "maritime." Accidents stemming from many diverse sources can have grave effects for "traditional maritime activity" when they occur at sea. If a fire threatened to disable a commercial vessel or to block the entrance to a major harbor, to exclude it from admiralty jurisdiction on the basis of its source would make little sense under the "nexus" test. Further, such an approach would seem productive of many instances in which it would

be necessary to try the case (to determine the source of the fire) to resolve the jurisdictional issue. It would also set the scene for endless hairsplitting definitional debates that do little to further the policy goals of this doctrine. Almost any conceivable accident when it occurs on board a ship can be categorized alternately as the result of a "traditional" activity necessarily performed by sailors through history (washing, preparing food, navigating the ship) or as the result of "modern" circumstances (an electric tooth brush malfunctions, or a microwave oven starts a fire). Analysis centered on how closely the source of an accident is related to "traditional maritime activity" thus seems an unproductive approach to the problem—at least in the context of accidents involving only vessels in navigable waters (as opposed to incidents involving objects on shore). There is little support in the language of the Supreme Court cases in this area for limiting admiralty jurisdiction to accidents that originated in a certain part of a vessel (i.e., the engine or steering mechanism), or that were caused by instrumentalities invented after a certain point in history.

However, the language used by the Court in *Foremost* does suggest some other limiting principles. Justice Marshall stressed repeatedly that a key function of admiralty jurisdiction is protecting "the smooth flow of maritime commerce" by ensuring uniform navigational rules, *id.* at 674-76, and by requiring that "all vessel operators are subject to the same duties and liabilities." *Id.* at 676. The references to "traditional maritime activity" in *Foremost* always rely upon discussions of "navigation" or the "*operation* of a vessel" to explain the concept. *Id.* at 674-76 (emphasis supplied). In a key passage, *Foremost* holds that in that case the collision between two pleasure boats on navigable waters fell under admiralty jurisdiction because of "[t]he potential disruptive impact of a collision between boats on navigable waters, *when coupled with* the traditional concern that admiralty law holds for navigation." *Id.* at 675 (emphasis supplied). Thus there is a reasonable basis for concluding that the *Foremost* Court intended to

limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation. In our view, a persuasive interpretation of *Foremost* would confine the admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.[2]

Because the case before us involves only non-commercial activities, we must ask (1) whether the tort had a potentially "disruptive impact," and (2) whether it involved navigation.

In our view, a fire on board a moored vessel could disrupt commercial navigation. If, for example, the Ultorian had been moored at a large municipal dock rather than in a recreational marina (apparently exclusively for pleasure boats), the fire or smoke might easily have spread to commercial vessels. Further, the fire could have spread from the marina across oil-covered water to threaten or obstruct commercial traffic in the channel or elsewhere. However, as *Foremost* emphasized, "[n]ot every accident in navigable waters that might disrupt maritime commerce will support admiralty jurisdiction." *Id.* at 675 n.5. This caveat seems well-founded in light of the precedent established in *Executive Jet*. If potential disruptive impact upon commercial shipping were the primary criterion for determining whether a tort were related to traditional maritime activity, then the *Executive Jet* plane crash in navigable waters would have fallen within admiralty jurisdiction.

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[2] We do not here adopt the "four-factor" test used in several other circuits, *see, e.g., Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 639-41 (5th Cir. 1985); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1121 (9th Cir. 1984); *Harville v. Johns-Manville Corp.*, 731 F.2d 775, 783-87 (11th Cir. 1984), because we do not find it helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*.

Thus we must proceed to analyze the second *Foremost* criterion for non-commercial maritime torts—the "traditional maritime activity" requirement.

Following the guidance given by careful scrutiny of the language in *Foremost*, we here apply a narrow reading of "traditional maritime activity," limiting application to cases involving navigation. Strong arguments, however, exist for broader treatment of this issue. Logically, fires aboard vessels—even when moored—are as much a traditional maritime concern as errors of navigation. Fire at sea, or at a mooring, is an ancient and dreaded hazard facing mariners. In *Richardson v. Harmon*, 222 U.S. 96 (1911), the Supreme Court—in commenting upon the exclusion from admiralty jurisdiction of torts involving vessels in which the resulting damage occurred on land—appeared to link collision and fire as twin maritime hazards:

> Prior to the [enactment of what is now section 189], it had been the settled law that the district court, sitting as a court of admiralty, had no jurisdiction to try an action for damages against a shipowner, arising from a fire on land, communicated by ship, or from a collision between the ship and a structure on land, such as a bridge or pier. The tort in both cases would have been a nonmaritime tort, and, as such, not within the cognizance of an admiralty court.

Id. at 101.

It is also somewhat puzzling to find the Court using a broad phrase such as "traditional maritime activity" in discussions that then proceed to deal only with navigation. The Court in *Foremost* may have been attempting to reconcile the relatively narrow policy basis for admiralty jurisdiction ("the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce," *Foremost* at 674), with the broad application of the admiralty jurisdiction since its inception to all varieties of torts occurring on navigable waters—and particularly to collisions of vessels on navigable waters, the paradigmatic admiralty case. *See id.* at 672. Once the Court decided

to include pleasure boats, thus determining that "maritime commerce" is not the only "traditional maritime activity," it appears to have looked to the traditional concern of admiralty law with navigational rules, and to the federal interest in ensuring uniformity in those rules, in defining the scope of the nexus requirement. *Id.* at 675. Although this approach has its difficulties, *see id.* at 682 (Powell, J., dissenting), it does attempt to determine which aspects of maritime activity are worthy of federal concern. Using this approach, the Court decided that a federal interest is served by having a uniform standard of conduct with respect to navigation on the navigable waterways. This uniform standard of conduct is ensured by federal laws governing the navigation of all vessels, including pleasure craft. *See* 33 U.S.C. §§ 2001-2073. Although federal laws also regulate fire safety aboard vessels,[3] the application of uniform fire safety laws to pleasure craft is not necessary to ensure the smooth flow of maritime commerce. By contrast, the comprehensive federal regulation of navigation through uniform "Rules of the Road" is essential to ongoing maritime commercial activity; if pleasure boats followed different rules than commercial vessels, they could disrupt the flow of commerce substantially. *But see* commentary cited *infra* note 4. Thus it seems that the federal interest invoked in *Foremost* is more at stake in the regulation of navigation than it is in the regulation of maritime fire safety.

Further, even if logic and the demands of a comprehensible framework of analysis might draw us to treat fire—even at a mooring—as the twin of collision when maritime hazards are involved, we would feel constrained by the Supreme Court's repeated use of specific language in assessing what constitutes "traditional maritime activity."

[3] Federal regulations currently govern fire prevention and portable fire extinguishers on all vessels, including pleasure craft. 46 C.F.R. §§ 72.03, 76.05-25. The now-repealed Motor Boat Act of 1940 also contained a number of sections relating to fire safety. 46 U.S.C. §§ 526g-526j (repealed 1983).

We have already noted that the *Foremost* court, when identifying traditional maritime activity or concerns, consistently mentioned "maritime commerce," "navigation," or "operation of a vessel." *See* 454 U.S. at 674-77.[4] Similarly, in *Executive Jet*, the Court described the necessary maritime nexus as "some relationship between the tort and traditional maritime activities, involving *navigation* or *commerce* on navigable waters." 409 U.S. at 256 (emphasis supplied). As the Fourth Circuit has noted:

> [I]n the context of the *Executive Jet* test, the *Foremost* decision reasserted the importance of navigation in establishing a sufficient nexus. The Supreme Court confirmed what was recognized by this court in *Richardson*; that is, controversies involving the navigation of vessels on navigable waters may come within the admiralty jurisdiction, although the vessels may be small pleasure boats.

Oliver by Oliver v. Hardesty, 745 F.2d 317, 319 (4th Cir. 1984).

In cases where there is an immediate threat to commercial shipping (as might be posed, for example, by a fire at a municipal dock serving all types of vessels), admiralty jurisdiction will clearly be invoked. However, in cases where the threat to commercial shipping is not direct or immediate, we are compelled to conclude that Supreme Court precedent to date recognizes torts involving pleasure boats as "maritime" only if there is at least a potential threat to commercial shipping, and only if "navi-

[4] The Supreme Court, in a much earlier case, noted that if it were to require a cause of action in tort to be of a maritime nature, it would look to "the relation of the wrong to maritime service, to navigation and to commerce on navigable waters." *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62 (1914) (quoted in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 258 (1972)).

gation" is implicated.[5] This may be too narrow and mechanical an interpretation of the Supreme Court. But the specific language of the Court seems to support it. And, as noted above, the Supreme Court's invocation of the need for uniform "Rules of the Road" as a touchstone where navigation or a collision is involved provides further support for this restrictive conclusion.[6] In the present case, if the Ultorian had been underway in the shipping channel when the fire broke out, we might reach a different result.

Even if we were not confined by the Supreme Court's repeated references to "navigation" as the traditional maritime activity in this context, there are reasons for declining to extend the nexus test to include fires on pleasure craft as a matter of course. First and most important, if this sort of fire were to join navigation as a "traditional concern" of maritime law, it would be nearly impossible to establish any limiting principle with respect

[5] We stress that where commercial shipping is *actually* implicated, then admiralty jurisdiction is clearly invoked. However, where there is only a *potential* threat to commercial shipping (as was the case, for example, in *Executive Jet*), and where commercial vessels are not actually involved, we view the "navigation" requirement as a necessary limitation of an otherwise very broad category of accidents.

[6] The asserted need for uniform Rules of the Road as a basis for admiralty jurisdiction is frequently invoked by courts. *See, e.g., In re Paradise Holdings, Inc.*, 795 F.2d 756, 760 (9th Cir.), *cert. denied*, 479 U.S. 1008 (1986); *Hogan v. Overman*, 767 F.2d 1093, 1094 n.1 (4th Cir. 1985); *Finneseth v. Carter*, 712 F.2d 1041, 1046-47 (6th Cir. 1983). It is just as frequently criticized by commentators. *See, e.g.*, Carnilla & Drzal, Foremost Insurance Co. v. Richardson, *If this is Water, It Must be Admiralty*, 59 Wash. L. Rev. 1, 6-7 (1983); Stolz, *Pleasure Boating and Admiralty*: Erie *at Sea*, 51 Calif. L. Rev. 661, 713-14 (1963); Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard*, 34 Wash. & Lee L. Rev. 121, 132 (1977); *see also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 682 (1981) (Powell, J., dissenting).

to what satisfies the nexus requirement. *Cf.* Baer, *Admiralty Law and the Supreme Court* § 25-4 (3d ed. 1979 & Supp. 1985) (summarizing *Foremost* and predicting that "a limitation [may be] placed on the scope of the Court's opinion"). For example, there would appear to be no way to distinguish the present case from the case of a pleasure boat that was moored too loosely during a storm and collided with a neighboring boat, or the case of a pleasure boat damaged by the swinging boom of a nearby sailboat. Indeed, without navigation[7] as the distinguishing feature, the new "nexus" test becomes identical with the old "navigable waters" test (at least for "vessels"), in defiance of the rule set out in *Executive Jet* and *Foremost*. Further, we do not think it appropriate to analogize broadly from navigation to fire in the context of a moored pleasure boat in the face of widespread scholarly criticism of the exercise of admiralty jurisdiction over pleasure boat torts. *See, e.g.*, Carnilla & Drzal, Foremost Insurance Co. v. Richardson: *If this is Water, It Must be Admiralty*, 59 Wash. L. Rev. 1 (1983) (criticizing *Foremost*'s assertion of admiralty jurisdiction over collision between small pleasure boats); Stolz, *Pleasure Boating and Admiralty*: Erie *at Sea*, 51 Calif. L. Rev. 861 (1963) (law of pleasure boating should be developed by state courts and legislatures); Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard*, 34 Wash. & Lee L. Rev. 121, 139-40 (1977) (in cases of pleasure craft torts, courts must determine "whether the exercise of jurisdiction furthers the commercial interests which admiralty courts were created to serve"); *cf.* 7A J. Moore & A.

[7] Because we are here dealing with a case that clearly does not involve navigation, we do not address the definitional difficulties involved in that concept. The difficult case might be a tort caused by a vessel in motion on the water that was not being deliberately "navigated" at the time (as when a boat slips its mooring). In that case, the Rules of the Road might be irrelevant to the hazard; however, an argument could be made that the vessel was "in navigation" because it was in motion on the navigable waters.

Palaez, *Moore's Federal Practice* ¶ .325[5] (2d ed. 1988) (admiralty tort jurisdiction should be limited to matters concerning maritime industry); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 250 (1950) (same).

Thus, there is a basis for the somewhat narrow interpretation followed in many of the recent decisions of other circuits concerned with the scope of admiralty jurisdiction in tort actions involving pleasure craft.[8] And this interpretation is reassuring to those who perceive important principles of federalism in these distinctions. *See, e.g., Foremost*, 457 U.S. at 685 ("federalism concern is the dominating issue in the case") (Powell, J., dissenting).

Accordingly, we affirm the district court's conclusion that Sisson lacks subject-matter jurisdiction under 28 U.S.C. § 1333.

II.

Sisson also argues that the Limitation of Liability Act provides a separate basis of admiralty jurisdiction.[9] Al-

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[8] *See, e.g., Hogan v. Overman*, 767 F.2d 1093, 1094 (4th Cir. 1985) (admiralty jurisdiction exists where navigational error of pleasure boat caused water skier to be injured); *Medina v. Perez*, 733 F.2d 170, 171 (1st Cir. 1984) (admiralty jurisdiction found where negligent navigation of pleasure boat injured swimmer), *cert. denied*, 469 U.S. 1106 (1985); *Smith v. Knowles*, 642 F. Supp. 1137, 1140 (D. Mo. 1986) (no admiralty jurisdiction over pleasure boat passenger's drowning because boat owner's "estimate of water's depth did not affect the navigation of the boat"); *see also In re Paradise Holdings, Inc.*, 795 F.2d 756, 760 (9th Cir. 1986) (admiralty jurisdiction found in case where "negligent operation of a vessel" resulted in death of body surfer); *Finneseth v. Carter*, 712 F.2d 1041, 1043 (6th Cir. 1983) (parties agreed that collision of two pleasure craft constituted traditional maritime activity).

[9] The district court was probably not incorrect in holding that Sisson could not raise this argument for the first time in a motion for reconsideration of the court's dismissal of his action for lack of subject-matter jurisdiction. *See Publishers Resource Inc.*

(Footnote continued on following page)

though the Act is not cast in jurisdictional terms, the Supreme Court in 1911 interpreted what is now section 189 of the Limitation of Liability Act[10] as expanding the scope of liability subject to limitation to include nonmaritime, as well as maritime, torts. *Richardson v. Harmon*, 222 U.S. 96, 106 (1911). Sisson contends that because the right of limitation under section 189 "does not depend on the maritime nature of the liability, jurisdiction under the Limitation Act is not coextensive with admiralty jurisdiction in tort." Brief of Plaintiff-Appellant at 12 (emphasis omitted).

In *Richardson v. Harmon*, the owners of a steam barge that had collided with a bridge sought to limit their liability for damage to the bridge. The Supreme Court noted that, prior to the enactment of section 189, there was no admiralty jurisdiction over an action against a shipowner for damage occurring on land. "The tort would have been a nonmaritime tort, and, as such, not within the cognizance of an admiralty court." *Id.* at 101. The Court, by finding that section 189 included nonmaritime torts within

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[9] *continued*

v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985). We have recognized, however, that a "court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact jurisdiction exists, should be exercised sparingly." *Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543, 549 (7th Cir. 1975). Thus, we will address the matter on the merits.

[10] Section 189 provides in part:

> The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending
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> . . . .

46 U.S.C § 189. When enacted (and at the time the Court decided *Richardson v. Harmon*, 222 U.S. 96 (1911)), section 189 was section 18 of the Shipping Act of 1884. For the sake of simplicity we will use the designation "section 189" throughout this opinion.

the Limitation of Liability Act, was able to allow the commercial vessel (that had been traveling on navigable waters) to limit its liability for the collision that caused damage to the bridge, a structure on land.

We question the applicability of *Richardson v. Harmon* to the present case in some part at least because the need that inspired that decision no longer exists. Section 189 was enacted to further the policy of the Limitation of Liability Act—to permit a shipowner to limit his risk to his interest in the ship—by allowing limitation of liability even when the damage resulted on land. That section 189 was intended to improve the competitive position of owners of commercial ships in this fashion is evidenced by its title when enacted: "An Act to Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Carrying Trade, and for Other Purposes." *See Richardson v. Harmon*, 222 U.S. at 101.

In 1948, however, Congress enacted the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, which provides in part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In passing this Act, Congress sought to "provide a remedy for damage done to land structures by ships on navigable waters." *Executive Jet*, 409 U.S. at 260; *see* S. Rep. No. 1593, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. & Admin. News 1898, 1899. Although the Extension of Admiralty Jurisdiction Act does not specifically supplant (or as the district court said here, "codify") *Richardson v. Harmon*, it does eliminate the need and reason for the rule established by the case; for now torts are "maritime" even when the damage occurs on land (and there is therefore no question that limitation of liability is available).

Perhaps more importantly, most of the cases involving issues related to the scope of admiralty jurisdiction under the Limitation of Liability Act were decided prior to the Supreme Court's decisions in *Executive Jet* and *Foremost*. During that time, the test for admiralty jurisdiction under 28 U.S.C. § 1333 was exclusively one of "locality." Thus, it is not surprising and seems rational policy that as long as "the event giving rise to the claims occurred on navigable waters" the owner of the vessel that caused the damage could limit his liability under the Act. G. Gilmore & C. Black, *The Law of Admiralty* 843-44 (1975). During this period, admiralty jurisdiction under the Limitation of Liability Act—although purportedly invoking a separate basis of jurisdiction—did not ignore completely the requirements of admiralty jurisdiction under section 1333. Even though it was not necessary that the *damage* occur on navigable water, there remained the requirement that the *vessel* involved in the tort bear a "relation" to navigable waters. *See, e.g., In re Builder's Supply*, 278 F. Supp. 254, 258 (N.D. Iowa 1968). Petitioners here readily concede that this "relation" is still a necessary ingredient of jurisdiction under the Limitation of Liability Act. Thus, vessel owners seeking to limit their liability are not relieved altogether from satisfying the locality test. The requirements of that test are merely somewhat relaxed.

Now that the test for admiralty jurisdiction under section 1333 contains a nexus as well as a locality requirement, we must decide how the test for jurisdiction under the Limitation of Liability Act should reflect this additional dimension of admiralty jurisdiction. Specifically, we are presented with the question whether a court may assert admiralty jurisdiction over a limitation of liability action when the underlying tort fails to qualify as maritime because it is not "functionally" within the admiralty jurisdiction (since it is unconnected to traditional maritime activity). For the reasons which follow, we do not accept Sisson's contention that the nexus requirement for admiralty jurisdiction over the tort is irrelevant to the determination whether the Limitation of Liability Act independently confers admiralty jurisdiction.

In our view, when a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing the Limitation of Liability Act—which provides for a practice apparently defensible only in a traditional maritime context—to provide an independent basis for admiralty jurisdiction. It is true that the Supreme Court allowed limitation of liability to be extended geographically beyond normal admiralty jurisdictional bounds. But *Richardson v. Harmon*, in extending limitation to liability for damage occurring on land, furthered the purposes of both admiralty jurisdiction in general and of the Limitation of Liability Act in particular. If the purpose of limitation was to improve the competitive position of the American shipping industry, it would make no sense to exclude damages which quite fortuitously impacted on land and not, for example, on another vessel. Thus, shipowners were allowed to limit their liability to the value of the vessel for all damage caused by the ship or its crew whether seaward or landward. No similar policy would be furthered, however, by allowing limitation for torts which bear no relation to traditional maritime activity; under those circumstances the competitive rationale would make no sense. If pleasure boating is to be excluded from admiralty jurisdiction for functional reasons, we should not extend limitation of liability in the face of those same reasons.

We believe that allowing admiralty jurisdiction here would be contrary to the policy of *Executive Jet* and *Foremost*. In creating the nexus requirement, the Supreme Court confined the reach of admiralty jurisdiction to include only those tort actions with which a uniform, sea-going jurisprudence should be concerned. To permit an alleged tortfeasor to circumvent the requirement that the tort bear a connection to traditional maritime activity simply by asserting a right to limit liability would eviscerate the nexus test. It would also lead to inequity between the parties if only the owner of the vessel causing the injury may claim jurisdiction under the Limitation of Liability Act. It appears that an injured party who wishes

to avail itself of the benefits of admiralty law would still be required to satisfy both the nexus and the locality tests.

Asserting admiralty jurisdiction over this case would also be inconsistent with principles of federalism espoused by the Supreme Court in *Executive Jet*. There the Court found that the crash of an airplane, originating in one state and destined for another, was only "fortuitously and incidentally connected to navigable waters" and, as such, bore "no relationship to traditional maritime activity." 409 U.S. at 249. Holding that this crash was outside the scope of admiralty jurisdiction, the Court explained that a state court "could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors." *Id.* (footnotes omitted). Similarly, in the present case, the claims of other boat owners and of the owner of the marina could "plainly" be heard in state court without the intrusion of traditional maritime law concepts.

Apparently no other court has addressed the precise question we are attempting to resolve here: whether an action to limit liability is within the scope of admiralty jurisdiction when the underlying wrong bears no relation to traditional maritime concerns. As we noted above, this question would not have arisen prior to *Executive Jet*. We have reviewed the cases published after that decision in which vessel owners had sought exoneration under the Limitation of Liability Act. In all of those cases, disputes over subject-matter jurisdiction were resolved by analyzing whether the alleged torts satisfied the locality and nexus requirements. *See, e.g., In re Paradise Holdings, Inc.*, 795 F.2d 756, 758-60 (9th Cir.), *cert. denied*, 479 U.S. 1008 (1986); *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251, 1252-54 (8th Cir. 1980); *In re Brown*, 536 F. Supp. 750, 751-52 (N.D. Ohio 1982); *Clinton Bd. of Park Comm'rs v. Claussen*, 410 F. Supp. 320, 323-26 (S.D. Iowa 1976). If those courts had thought that the Limitation of Liability Act provided an independent basis of jurisdiction, irrespective of any relation to tradi-

tional maritime concerns, it would have been simpler for them to sustain jurisdiction on that ground. That none of the courts opted for this approach may call into question the continued validity of the Limitation of Liability Act as an independent basis of admiralty jurisdiction in these circumstances.

For all of the reasons stated, we hold that a proceeding under the Limitation of Liability Act will be cognizable in admiralty only when the underlying tort has a relationship to traditional maritime activity.[11] Accordingly, the district court's dismissal of this action for want of subject-matter jurisdiction is

AFFIRMED.

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[11] Courts from a number of circuits have split on the issue whether the Limitation of Liability Act applies to pleasure craft. *Compare Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937); *Warnken v. Moody*, 22 F.2d 960 (5th Cir. 1927); *In the Matter of Michael Roberto*, 1987 A.M.C. 982 (D.N.J. 1986); *Complaint of Brown*, 536 F. Supp. 750 (N.D. Ohio 1982); *Armour v. Gradler*, 448 F. Supp. 741 (W.D. Penn. 1978); *Application of Theisen*, 349 F. Supp. 737 (E.D.N.Y. 1972); *In re Klarman*, 295 F. Supp. 1021 (D. Conn. 1968); *Petition of Porter*, 272 F. Supp. 282 (S.D. Tex. 1967); *Petition of Colonial Trust Co.*, 124 F. Supp. 73 (D. Conn. 1954) (all holding Limitation of Liability Act applicable to pleasure craft) *with In re Lowing*, 635 F. Supp. 520 (W.D. Mich. 1986); *In re Tracey*, 608 F. Supp. 263 (D. Mass. 1985); *Baldassano v. Larsen*, 580 F. Supp. 415 (D. Minn. 1984); *Kulack v. The Pearl Jack*, 79 F. Supp. 802 (W.D. Mich. 1948) (all holding Limitation of Liability Act inapplicable to pleasure craft). Because we affirm the dismissal of Sisson's action for lack of subject-matter jurisdiction, we need not decide whether a pleasure boat owner may limit his liability for a tort that satisfies both the nexus and locality requirements of admiralty jurisdiction.

RIPPLE, *Circuit Judge*, concurring in the judgment. The majority opinion is a careful effort to apply faithfully the Supreme Court's holding in *Foremost Insurance Co. v. Richardson*, 457 U.S. 68 (1982). In my view, the court reaches the correct result. The fire that caused the damage here occurred in a pleasure boat tied to a dock within the well-delineated confines of a marina dedicated exclusively to the wharfage of pleasure boats. It presented no harm to maritime commerce.

I write separately because the test adopted by the court, while producing the correct result in this case, will place inappropriate restrictions on admiralty jurisdiction in other instances. In my view, *Foremost* does not compel restricting admiralty jurisdiction in noncommercial activities to matters directly involving the navigation of a vessel. In *Foremost*, the Supreme Court had to deal with an incident arising out of an alleged noncompliance with the "Rules of the Road." However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.

Hopefully, before long, the Supreme Court will revisit this quagmire and resolve the current ambiguity generated by the courts of appeals in the wake of *Foremost*.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 16, 1989.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

Nos. 87-2713 and 87-2736

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht, The Ultorian, for exoneration from or limitation of liability,

Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 1991—**Nicholas J. Bua**, *Judge.*

ORDER

On consideration of the Petition for Rehearing with Suggestion for Rehearing En Banc filed by counsel for the plaintiff-appellant in the above-named cause and the response thereto by appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

RIPPLE, *Circuit Judge*, concurring. I join in the denial of the petition for rehearing. The matters raised in that petition were examined by the panel during its consideration of the merits, and I do not believe that further examination by the panel would be fruitful.

I have also decided not to call for a vote on the suggestion for rehearing en banc. This circuit sees little in the way of admiralty litigation and here the result, if not the articulated rule of decision, is correct. Before this court revisits the area again, there is every probability that the Supreme Court will have an opportunity to supply further guidance with respect to its decision in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982).

APPENDIX 3

[663 Supp. 858 (N.D. Ill. 1987)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 1991 Date: June 29, 1987

Name of Assigned Judge: BUA

Case Title: IN RE: EVERETT A. SISSON

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Order cause dismissed for lack of subject matter jurisdiction. Motion to find case 87 C 652 related to the instant cause is DENIED.

* * * * *

(12) ☒ (For further detail see * * * ☒ order attached to the original minute order form.)

[Docketed July 1, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF

The Complaint of Everett A. Sisson, as Owner of the Motor Yacht, THE ULTORIAN, for Exoneration From or Limitation of Liability.

No. 86 C 1991 — Honorable Nicholas J. Bua, Presiding

ORDER

This order concerns claimants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction. For the reasons stated herein, claimants' motion to dismiss is granted.

I. FACTS

On September 24, 1985, plaintiff's 56-foot pleasure yacht, The Ultorian, was docked at Washington Park Marina in Michigan City, Indiana. A fire erupted on The Ultorian completely destroying the vessel and causing extensive damage to the marina and several neighboring boats. According to allegations made by plaintiff in a related suit against the manufacturer of The Ultorian, the fire was caused by an allegedly defective washer/dryer on board the vessel. The net value of The Ultorian after the casualty was $800. Extensive damage to the marina and vessels in the vicinity of The Ultorian resulted from the fire. The claimant owners of the vessels and marina estimate damages to exceed $275,000.

II. DISCUSSION

Plaintiff instituted this action for injunctive declaratory relief seeking to limit his liability to claimants for damages arising out of the September 24 incident. Plaintiff asserts jurisdiction under 28 U.S.C. §1333 and contends that the Limitation of Liability Act, 46 U.S.C. §183[1] limits his potential liability to $800, the salvage value of The Ultorian. Claimants motion to dismiss plaintiff's actions on two grounds. First, claimants assert that admiralty and maritime jurisdiction under §1333 does not exist in the present case. Second, claimants argue that the Limitation of Liability Act does not apply to pleasure craft. Because this court finds subject matter jurisdiction is lacking, claimants' second argument is not addressed below.

As the purpose of plaintiff's action is to limit possible tort liability, this court must analyze admiralty jurisdiction principles applicable to tort cases. Traditionally, federal admiralty jurisdiction in tort cases existed whenever the actionable wrong occurred on a navigable waterway. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971); *The Plymouth*, 3 Wall. 20, 35-36 (1866). Subsequent decisions of the Supreme Court, however, have added a second prerequisite. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972). To establish admiralty jurisdiction in a tort case today, not only must the wrong occur on navigable waters, but the tort must bear a "significant relationship to traditional maritime activity." *Foremost*, 457 U.S. at 674-75; *Executive Jet*, 409 U.S. at 268.

[1] The Limitation of Liability Act provides in pertinent part:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owners or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. 46 U.S.C. §183.

In *Executive Jet*, the Supreme Court addressed whether admiralty jurisdiciton existed over tort claims arising from the crash of a small commercial passenger jet into Lake Erie. *Executive Jet*, 409 U.S. at 250. The cause of the crash was assigned to the ingestion of birds in the plane's engines while the jet was still over the runway. *Id.* Plaintiffs contended that although the alleged negligent conduct of the traffic controllers in failing to warn of the birds occurred on land, the fact the jet was damaged upon impact with the navigable waters of Lake Erie gave rise to admiralty jurisdiction. *Id.* at 266-67. Rejecting the traditional locality rule as the sole test for determining admiralty jurisdiction, the Court ruled §1333 jurisdiction existed only when the actionable conduct "bears a significant relationship to traditional maritime activity." *Id.* at 268. Because the wrong complained of by plaintiffs had no connection with "traditional forms of maritime commerce or nagivation," the Court concluded admiralty jurisdiction did not exist and ordered plaintiffs' actions dismissed. *Id.* at 272.

In *Foremost Ins. Co. v. Richardson*, the Supreme Court specifically rejected the contention that admiralty jurisdiction depended on whether the actionable conduct arises in the context of some commercial maritime activity. *Foremost*, 457 U.S. at 674-76. In that case, the collision of two small pleasure craft on navigable waters resulted in the death of an occupant. *Id.* at 669. The decedent's wife instituted a tort action for damages against the operator of the other boat in federal district court asserting admiralty jurisdiction. *Id.* Addressing the assertion that admiralty jurisdiction was limited to situations involving some aspect of commercial maritime activity, the Court explained the federal interest in protecting maritime commerce could not be adequately served if admiralty jurisdiction extended only to those actually engaged in commercial maritime activity. *Id.* at 674-75. According to the Court, the federal interest could be fully protected "only

if all operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial activity on maritime commerce." *Id.* at 675. Thus, the fact noncommercial vessels were involved in the activity leading to the actionable conduct did not preclude the existence of a significant relationship to traditional maritime activity. *Id.* at 676. Centering on the fact that the alleged wrong involved the negligent navigation of a vessel on navigable waters, the Court concluded that the tortious conduct had a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction. *Id.* at 674.

Lower courts applying the two-part *Executive Jet/Foremost* test in tort cases involving pleasure craft focus on the existence of a navigational error to find admiralty jurisdiction. *See Hogan v. Overman*, 767 F.2d 1093 (4th Cir. 1985) (allegation that swimmer was injured due to alleged navigational error sufficient to show substantial relationship with traditional maritime activity); *Souther v. Thompson*, 754 F.2d 151 (4th Cir. 1985) (no admiralty jurisdiction exists where controversy involving pleasure boats does not arise out of alleged navigational error); *Oliver by Oliver v. Hardesty*, 745 F.2d 317 (4th Cir. 1984) (proper emphasis for ascertaining admiralty jurisdiction in cases involving pleasure boats is on the navigation of such vessels); *Medina v. Perez*, 733 F.2d 170 (1st Cir. 1984) (admiralty jurisdiction found where alleged negligent navigation of pleasure vessel resulted in injury to swimmer); *Smith v. Knowles*, 642 F.Supp. 1137 (D. Md. 1986) (action against owner and operator of small motorboat arising when decedent jumped overboard to urinate and drowned dismissed for lack of admiralty jurisdiction as misjudgment of water's depth was not a navigational error nor a negligent act which might have affected traditional maritime activity). Analyzing the Supreme Court's statements in *Foremost* and *Executive Jet* emphasizing the need for uniform rules governing navigation of vessels on navigable waters, these lower courts concluded that

some type of navigational error must be alleged to find a significant relationship with traditional maritime activity when pleasure craft are involved. *Hogan v. Overman*, 767 F.2d at 1094; *Souther v. Thompson*, 754 F.2d at 153; *Oliver by Oliver v. Hardesty*, 745 F.2d at 319; *Medina v. Perez*, 733 F.2d at 171; *Smith v. Knowles*, 642 F.Supp. at 1139-40. The rationale for focusing on an alleged navigational error stems from the Supreme Court's reasoning in *Foremost* that although ownership and operation of pleasure boats cannot be viewed as a traditional maritime activity, extension of admiralty jurisdiction is warranted where operation of pleasure craft might interfere with commercial vessels. *Smith v. Knowles*, 642 F.Supp. at 1139, *citing Foremost*, 457 U.S. at 675. Thus, as one court observed, the clear import of the *Foremost* decision is that admiralty jurisdiction exists only when the wrongful conduct presents a significant risk of damaging or delaying commercial vessels. *Smith v. Knowles*, 642 F.Supp. at 1139.

Recently, certain courts addressing product liability claims of laborers installing asbestos materials in commercial vessels have developed a four-factor test for determining whether the alleged wrong bears a significant relationship to traditional maritime activity. *See e.g., Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 639-41 (5th Cir. 1985), *reaffirming Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973). These four factors include: (1) functions and roles of the parties; (2) types of vehicles and instrumentalities involved; (3) causation and type of injury; and (4) traditional concepts of the role of admiralty law. *Id.* Courts analyzing the tort claims of shipyard employees under this four-part test universally determined that the wrong alleged did not bear a substantial relationship to traditional maritime activity. *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985); *Woessner v. Johns-Manville Corp.*, 757 F.2d 634, 639-41 (5th Cir. 1985); *Harville v. Johns-Manfille Prod. Corp.*, 731 F.2d 775, 787 (11th Cir. 1984); *Myhran v. Johns-Manville Corp.*,

741 F.2d 1119, 1121 (9th Cir. 1984). Other circuits addressing similar asbestosis claims under the assertion of admiralty jurisdiction came to the same result but declined to adopt the four-part test. *Austin v. Unarco Ind., Inc.*, 705 F.2d 1, 11-14 (1st Cir. 1983) (focusing on function the injured party was performing at time of injury); *Keene Corp. v. United States*, 700 F.2d 846, 844-45 (2d Cir. 1983) (emphasizing defective product was not designed specifically for maritime use). Nonetheless, the four-factor test appears to be the majority position.

Without addressing whether the Seventh Circuit is likely to adopt the four-part analysis, certain difficulties arise in applying this test to tort cases involving pleasure craft. One court analyzing the four-prong test reasoned that when applied to situations involving pleasure craft, the four factors essentially boil down to two: factors three (causation and type of injury) and four (traditional concepts of the role of admiralty law) combine into a "hit the tanker test," while factors one (function and roles of parties) and two (type of vehicles and instrumentalities involved) comprise a "substantial relationship test." *Smith v. Knowles*, 642 F.Supp. at 1139. This synthesis stems from the discussion in *Foremost* concerning the ability of pleasure boats to interfere with commercial vessels. *Id.* According to the *Smith* court, "the traditional role of admiralty law (factor four) is to protect maritime commerce. . . . Thus, if the causation and type of injury (factor three) might have damaged or delayed a tanker, jurisdiction would lie." *Id.* Regarding factors one and two, the *Smith* court reasoned that although the falling plane in *Executive Jet* might have struck a tanker, "flying a plane does not bear a substantial relationship to traditional maritime activity." *Id.* Although acknowledging its summation of the four-factor test might not be flawless, the court displayed confidence that the "hit the tanker test" was premised on an accurate reading of *Foremost*. *Id.* at 1140. Applying its analysis to the facts before it, the court concluded the boat owner's error estimating water depth while encouraging a guest to jump overboard did not bear a substantial relationship to traditional maritime activity because such conduct could not result in a collision with a tanker. *Id.* Concluding that even if the "hit the tanker" test was incorrect, the court stated that common sense dictated that admiralty jurisdiction was not intended to apply to cases like the one before it. *Id.*

This court shares the view expressed in *Smith v. Knowles* that when applied to pleasure boating incidents, the four-factor test developed in asbestosis cases telescopes into a two-part inquiry: (1) whether the tort involved vehicles or objects of a maritime nature and parties performing some function or role with a substantial relation to traditional maritime activity; and (2) whether the conduct complained of presents a substantial likelihood of impeding commercial vessels. In the present case, no dispute exists that the wrong occurred on navigable waters. Thus, the first *Executive Jet/Foremost* requirement for admiralty jurisdiction is present. Difficulty arises, however, in finding the alleged wrong bears a substantial relation to traditional maritime activity. Here, although the vehicles involved, pleasure boats, are distinctly maritime in nature, the instrumentality blamed for the fire, a washer/dryer, is not. The fact the parties involved are boat and marina owners is of little relevance in this case as this court has no indication of what function or activity the parties were engaging in at the time of the fire. Most importantly, however, the mooring of a pleasure craft with a defective washer/dryer in a recreational marina such as Washington Park presents no substantial likelihood that a tanker would be damaged or delayed. Unlike cases involving pleasure boats where admiralty jurisdiction is recognized,[2]

[2] Plaintiff asserts *Hassinger v. Tideland Electric Membership Corp.*, 781 F.2d 1022 (4th Cir. 1986), compels a finding of admiralty jurisdiction in the present case. This court disagrees. *Hassinger* involved wrongful death actions by estates of three sailors who were electrocuted when the uninsulated mast of their sailboat struck an uninsulated power line negligently placed over navigable waters by an electric company. *Id.* at 1024. Reasoning that the

(Footnote continued on following page)

the wrong in the present case does not involve navigation of a vessel. Other courts addressing assertions of admiralty jurisdiction for injuries occurring while pleasure craft are not in navigation have failed to find any substantial relationship with traditional maritime activity. *See Smith v. Knowles, supra*; *Montgomery v. Harrold*, 473 F.Supp. 61, 64 (E.D. Mich. 1979) (guest asphyxiated by lethal fumes while aboard pleasure craft moored in marina; decedent's estate fails to show substantial relation to traditional maritime activity under four-factor test).

Plaintiff, however, contends that similarities between this case and *American Eastern Dev. Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979), and *English Whipple Sailyard, Ltd. v. Yawl Ardent*, 459 F.Supp. 866 (W.D. Pa. 1978), compel the conclusion admiralty jurisdiction exists. However, a close reading of both cases indicates that admiralty jurisdiction was premised on breaches of maritime contracts. The *Executive Jet/Foremost* test for admiralty jurisdiction in tort cases does not apply to contract claims. Admiralty jurisdiction over contract claims "depends on whether the contract relates to ships in their use as ships or to commerce or transportation in navigable waters." *Medema v. Gombo's Marina Corp.*, 97 F.R.D. 14, 15 (N.D. Ill. 1982), *quoting Ford Motor Co. v. Wallenius Lines, M/V Atl. Cinderella*, 476 F.Supp. 1362, 1365 (E.D. Va. 1979).

In *English Whipple*, a sailboat dealer being unable to negotiate payment for repairs to defendant's pleasure boat brought an action in rem against the vessel. *English Whipple*, 459 F.Supp. at 869, 873. The boat owner counterclaimed for breach of contract and negligence. *Id.* Al-

[2] *continued*
sailboat was engaged in a navigational function at the time it contacted the power line, and that the placement of the power line created a dangerous impediment to navigation, the court sustained admiralty jurisdiction. *Id.* at 1027-28. The focus of the *Hassinger* court on navigation and impediments to navigation clearly makes any application to the present case inappropriate.

though the decision is devoid of any discussion concerning admiralty jurisdiction, the claim of the party instituting the action clearly arose in contract. Contract claims for repair or maintenance of maritime vessels are within the admiralty jurisdiction of the federal courts. *See e.g., CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377 (2d Cir. 1982).

Similarly, in *American Eastern*, claims asserted by plaintiff boat owners against the defendant marina sounded in contract. In *American Eastern*, boat owners contracted with a marina for the dry storage of their vessels which were subsequently damaged in a fire set by the marina's president. *American Eastern*, 608 F.2d at 124. Although the boat owners clearly asserted certain tort claims against the marina for the damage to their vessel, it is also clear they premised certain claims on storage contracts with the marina. According to the contract, the marina was required to store the vessels in dry storage racks until the owners desired to use them. *Id.* At such time, the boats would be forklifted into the water and then returned to dry storage at the end of the day. *Id.* Discussing whether the contract for dry storage was maritime in nature, the court reviewed decisions involving maritime liens for docking wharfage and storage fees.[3] *Id.* at 125. The court found that the distinguishing factor between cases imposing maritime liens for breach of docking, wharfage or storage contracts and those denying such liens was whether the vessels were completely removed from navigation. *Id.* Reasoning that the nature of the storage contracts in its case cut against the conclusion the boats were removed from navigation, the court ruled that the dry storage contracts fell within the court's admiralty jurisdiction. *Id.*

[3] Contracts to provide wharfage or storage of a vessel are maritime in nature, and breach of such agreements are cognizable in admiralty. *Selame Assoc., Inc. v. Holiday Ins., Inc.*, 451 F.Supp. 412, 418 (D. Mass. 1978).

Significantly, the *American Eastern* opinion contains no mention of *Executive Jet* or of the four-factor maritime nexus test which was originally formulated by the Fifth Circuit in *Kelley v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973). Although *American Eastern* does not state the specific theories of recovery asserted by the boat owners, it is apparent that boat owners were relying in part on rights and duties arising from the dry storage contract. Because the contract created a bailment relationship each time the boats were removed from the water and placed in the marina's dry storage racks, the marina, as bailee, had a duty to use reasonable care to protect the bailors from loss. Breach of this duty to exercise reasonable care provides both a contract claim and a tort claim. *Holmes v. Freeman*, 23 Conn.Supp. 504, 185 Atl.2d 88, 91 (Conn. App. Ct. 1962) (liability for damage to bailed property may spring either from tort or from contract). Once finding admiralty jurisdiction over the boat owners' contract claims, the *American Eastern* court was empowered by principles of pendent jurisdiction to entertain the tort claims. *See Medema v. Gombo's Marina Corp.*, 97 F.R.D. 14, 15 (N.D. Ill. 1982) (boat owner sues in contract and tort for damage to boat at marina in winter storage resulting from fire; court finds admiralty jurisdiction over contract claims arising out of bailment relationship and sustains negligence claim under pendent jurisdiction principles).

The findings of admiralty jurisdiction in *American Eastern* and *English Whipple* were not based on claims sounding in tort, but were instead premised on the parties' contractual relationships. As such, those cases do not aid plaintiff in his argument that admiralty jurisdiction exists in the present case. Because this court finds that wrong alleged fails to bear a substantial relationship to traditional maritime activity, admiralty jurisdiction is lacking and claimants' motion to dismiss must be granted.

III. CONCLUSION

For the foregoing reasons, claimants' motion to dismiss for lack of subject matter jurisdiction is granted.

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA
Nicholas J. Bua
Judge, United States District Court

Dated: June 29, 1987

APPENDIX 4

[668 F. Supp. 1196 (N.D. Ill. 1987)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 1991 Date: September 24, 1987

Name of Assigned Judge: BUA

Case Title: IN THE MATTER OF EVERETT SISSON

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Petitioner's motion for reconsideration of dismissal is DENIED.

* * * * *

(12) ☒ (For further detail see * * * ☒ order attached to the original minute order form.)

[Docketed September 25, 1987]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF
the Complaint of EVERETT SISSON,
as owner of the Motor Yacht, THE
ULTORIAN, for exoneration from or
limitation of liability

No. 86 C 1991 – Honorable Nicholas J. Bua, Presiding

ORDER

Before this court is petitioner's motion for reconsideration of this court's order dismissing petitioner's action for lack of subject matter jurisdiction. For the reasons stated herein, petitioner's motion for reconsideration is denied.

I. FACTS

On September 24, 1985, petitioner's 56-foot pleasure yacht, The Ultorian, was docked at Washington Park Marina in Michigan City, Indiana. A fire erupted on The Ultorian completely destroying the vessel and causing extensive damage to the marina and several neighboring boats. According to allegations made by petitioner in a related suit against the manufacturer of The Ultorian, the fire was caused by an allegedly defective washer/dryer on board the vessel. The net value of The Ultorian after the casualty was $800. Extensive damage to the marina and vessels in the vicinity of The Ultorian resulted from the fire. The claimant owners of the vessels and marina estimate damages to exceed $275,000.

II. DISCUSSION

In this court's last order dismissing petitioner's action for lack of subject matter jurisdiction, this Court exhaustively addressed and rejected petitioner's arguments that the fire which destroyed The Ultorian bore a sufficient relationship to traditional maritime activity to give rise to admiralty jurisdiction under 28 U.S.C. §1333. *See In re Sisson*, 663 F.Supp. 858 (N.D. Ill. 1987). In his motion for reconsideration, petitioner now argues that federal jurisdiction is provided by a new source: the Limitation of Liability Act, 46 U.S.C. §183. Yet, as claimants point out, motions for reconsideration serve the limited function of correcting errors of law or fact, or presenting newly discovered evidence. Motions for reconsideration cannot be used to introduce new legal theories for the first time, or to raise legal argumentation which could have been heard during the pendency of the previous motion. *Publishers Resource Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). As nothing exists in petitioner's present motion which petitioner could not have raised previously, petitioner's motion for reconsideration must be denied.

However, even if this court were to reach petitioner's argument that the Limitation of Liability Act provides an independent basis of federal admiralty jurisdiction, this court nonetheless would be compelled to dismiss the petition. The authority cited by petitioner, *Richardson v. Harmon*, 222 U.S. 96 (1911), which held that the Limitation of Liability Act extended admiralty jurisdiction to "non-maritime" torts (torts caused by or involving a vessel on navigable waters which result in damage to property on or affixed to land) was essentially codified in 1948 by the enactment of the Extension of Admiralty Jurisdiction Act. 46 U.S.C. §740. This Act reads in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> 46 U.S.C. §740.

This subsequent congressional action made clear that admiralty jurisdiction exists irrespective of whether the tort occurs on land or water so long as other requisites for admiralty jurisdiction are present. *See Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (8th Cir. 1980); *Jorsch v. LeBeau*, 449 F.Supp. 485, 487 (N.D. Ill. 1978) (holding that irrespective of the locality of the tort, a significant relation to traditional maritime activity must be shown before admiralty jurisdiction can be established). Courts interpreting the Limitation of Liability Act after the enactment of the Extension of Admiralty Jurisdiction Act have refused to find subject matter jurisdiction where other requisites for admiralty jurisdiction were not present. *See In re Howser's Petition*, 227 F.Supp. 81, 85-86 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F.Supp. 411, 413-14 (N.D.N.Y. 1960) (federal jurisdiction does not exist over petition to limit liability brought pursuant to 46 U.S.C. §183 unless traditional requirements for admiralty jurisdiction are met). *But cf. In re Colonial Trust Co.*, 124 F.Supp. 73, 75 (D. Conn. 1954) (Limitation of Liability Act provides an independent basis for admiralty jurisdiction).

After the Supreme Court's decisions in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), and *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), the law became clear that federal admiralty jurisdiction in tort cases arose only when the tort resulted from activity relating to a vessel on navigable waters and activity having a significant relationship to traditional maritime activity. These standards were applied by this court in reaching the conclusion that petitioner's action for limitation of liability must be dismissed for lack of subject matter jurisdiction. This court believes that in light of the intervening congressional action extending admiralty jurisdiction to torts occurring on land as well as the Supreme court's recent pronouncements in *Executive Jet*, and *Foremost Ins. Co.*, redefining the scope of admiralty jurisdiction in tort cases, petitioner's reliance on *Richardson v. Harmon* is misplaced and unpersuasive. As such, this court is unable to accept petitioner's assertion that irrespective of whether a significant relationship with mari-

time activity exists, the mere filing of a petition of limitation of liability under §183 provides a sufficient basis for subject matter jurisdiction.

Finally, even if this court accepted petitioner's argument that subject matter jurisdiction is provided by the Limitation of Liability Act, this court is unpersuaded that the Act applies to incidents resulting from the negligent operation or maintenance of pleasure craft used for recreational purposes. The legislative history of the Limitation of Liability Act leaves no doubt the congressional purpose behind the law was encouraging investment in the American merchant marine industry. *See* 23 Cong. Globe 331-32, 714, 31st Cong., 2d Sess. (Jan. 25, 1951). Recognizing a vast majority of other countries heavily engaged in maritime commerce maintained laws limiting or exonerating ship owners from tort liability, Congress enacted the Limitation of Liability Act to place American shipping investors on an equal footing with their foreign counterparts. *Id.* Given this clear congressional purpose, a number of courts have refused to apply the Limitation of Liability Act to pleasure craft. *See In re Lowing*, 635 F.Supp. 520 (W.D. Mich. 1986); *In re Tracey*, 608 F.Supp. 263 (D. Mass. 1985); *Baldassano v. Larsen*, 580 F.Supp. 415 (D. Minn. 1984); *Kulack v. The Pearl Jack*, 79 F.Supp. 802 (W.D. Mich. 1948) (all holding that Limitation of Liability Act does not apply to pleasure craft). *But see Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937); *In re Brown*, 536 F.Supp. 750 (N.D. Ohio 1982); *Armour v. Grandler*, 448 F.Supp. 741 (W.D. Pa. 1978); *In re Theisen*, 349 F.Supp. 737 (E.D.N.Y. 1972); *In re Klarman*, 295 F.Supp. 1021 (D. Conn. 1868) (all finding owners of pleasure craft are entitled to invoke protections of Limitation of Liability Act).

Analyzing the reasoning behind the divergent views on this issue, this court is inclined to agree with those courts refusing to extend the Limitation of Liability Act to pleasure craft. Thus, for the reasons stated in *In re Lowing*, *In re Tracey*, and *Baldassano v. Larsen*, this court would deny petitioner's petition for limitation even if subject matter jurisdiction existed to entertain this action.

III. CONCLUSION

For the foregoing reasons, petitioner's motion for reconsideration is denied.

IT IS SO ORDERED.

/s/ NICHOLAS J. BUA
Nicholas J. Bua
Judge, United States District Court

Dated: September 24, 1987

APPENDIX 5

§181. LIABILITY OF MASTERS AS CARRIERS

If any shipper of patina, gold, gold dust, silver, bullion or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or truck, shall lade the same as freight or baggage, or any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. R.S.§4281

§182. LOSS BY FIRE

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. R.S.§4282

§183. AMOUNT OF LIABILITY; LOSS OF LIFE OR BODILY INJURY; PRIVITY IMPUTED TO OWNER; "SEAGOING VESSEL"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person or any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount of value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tor age; Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections, (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R.S. §4283; Aug. 29, 1935, c. 804, §1, 49 Stat. 960; June 5, 1936, c. 521, §1, 49 Stat. 1479.

§184. APPORTIONMENT OF COMPENSATION

Whenever any such embezzlement, loss, destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. R.S.§4284; Feb. 27, 1877, c. 69, §1,19 Stat. 251.

§185. PETITION FOR LIMITATION OF LIABILITY; DEPOSIT OF VALUE OF INTEREST IN COURT; TRANSFER OF INTEREST TO TRUSTEE

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice

of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R.S.§ 4285; June 5, 1936, c. 521, § 3,49 Stat. 1480.

§186. CHARTERER MAY BE DEEMED OWNER

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. R.S.§4286.

§187. REMEDIES RESERVED

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy

to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. R.S. §4287.

§188. LIMITATION OF LIABILITY OF OWNERS APPLIED TO ALL VESSELS

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters. R.S.§4289; Feb. 18, 1875, c.80, §1, 18 Stat. 320; June 19, 1886, c. 421, § 4,24 Stat. 80; June 5, 1936, c.521, § 4, 49 Stat. 1481.

§189. LIMITATION OF LIABILITY OF OWNERS OF VESSELS FOR DEBTS

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. June 26, 1884, c. 121, §18, 23 Stat. 57.

No. 88-2041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,
Petitioner,

v.

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, et al., Claimants,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. §1333 and Article III, Section 2, of the Constitution.

2. Whether a federal court may assert admiralty jurisdiction over a limitation of liability action when the underlying tort fails to qualify as maritime because it is unconnected to traditional maritime activity.

LIST OF PARTIES

The parties to the proceedings below were Everett A. Sisson, as owner of the motor yacht the ULTORIAN and the respondents Burton B. Ruby, Fireman's Fund Insurance Company, Port Authority of Michigan City, Joseph T. Charles, Cincinnati Insurance Company, Continental Insurance Company, John P. Walter and Roger Dillon as claimants in the limitation proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

Statutes

No. 88-2041

IN THE

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EVERETT A. SISSON,
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Respondents, BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY and PORT AUTHORITY OF MICHIGAN CITY, respectfully request that this Court refuse to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding.

STATEMENT OF THE CASE

The Petitioner's statement of the case omits to state that Petitioner's yacht was a pleasure craft, docked at the Washington Park Marina, which harbored other pleasure boats. The fire which erupted on the Petitioner's pleasure yacht caused damage to the dock and several other pleasure yachts. Neither commercial vessels nor commercial shipping were affected by the occurrence.

Petitioner sought injuctive and declaratory relief in the district court, seeking to limit his liability to the claimants to $800.00, the alleged value of his yacht after the fire.

The district court dismissed Petitioner's complaint for lack of admiralty jurisdiction. Petitioner moved for reconsideration, alleging that the Limitation of Liability Act, 46 U.S.C. §181, *et seq.* provides a separate source of admiralty jurisdiction. The district court denied the motion because Petitioner introduced a new legal theory not raised in the original opposition to dismissal. The court then reviewed Petitioner's theory and rejected it, concluding that the Limitation of Liability Act does not provide an independent basis of admiralty jurisdiction, and, even if it did, Petitioner is not entitled to limit his liability for damage caused by a pleasure boat.

Petitioner never raised in the district court or in the Seventh Circuit the argument that the Extension of Admiralty Act, 46 U.S.C. §740, *et seq.*, provides an independent source of admiralty jurisdiction.

REASONS FOR DENYING THE WRIT

Pursuant to Rule 17 of the Rules of Practice of the Supreme Court of the United States, a review on writ of certiorari is not a matter of right, but of judicial discretion, to be granted only when there are special and important reasons therefore, such as when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeal on the same matter or when a federal court of appeals has decided a federal question in a way in conflict with applicable decisions of the United States Supreme Court. This Court should, in its discretion, refuse to issue a writ of certiorari because this case involves a narrow set of facts regarding which the district court and federal appellate court issued rulings consistent with the published decisions of other federal courts of appeal and consistent with the decisions of this United States Supreme Court.

I.

This Case Presents Narrowly Drawn Facts Which Do Not Warrant Supreme Court Review.

This case presents the unique and unusual question of whether a fire aboard a non-commercial vessel docked at a recreational marina, allegedly caused by a defective washer-dryer unit, bears a significant relationship to traditional maritime activity. The Seventh Circuit applied the plain language of this Court's rulings in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) in deciding that these facts do not lend themselves to admiralty jurisdiction.

The Seventh Circuit recognized that its ruling was limited to the narrow fact pattern presented in this case. It recognized that if the Petitioner's vessel had been in a shipping channel when the fire broke out, blocking commercial shipping or if the vessel had a commercial aspect, the result reached may have been different. *Decision* at page 12a, n.5. However, since this fire had absolutely no commercial import and since the occurrence had nothing to do with navigation, the Seventh Circuit applied admiralty law to these facts and concluded, as did the district court, that these facts do not warrant federal admiralty jurisdiction. Since the decision of the Seventh Circuit is limited to the unique facts of this case, it does not warrant Supreme Court review.

II.

The Decision Of The Seventh Circuit Is Consistent With Decisions Of This Supreme Court.

The Seventh Circuit based its decision upon the plain and unambiguous language of this Court's opinions in *Executive Jet* and *Foremost*. In *Executive Jet*, this Court held that admiralty jurisdiction may be invoked in tort cases only where the plaintiff shows "a significant relationship to traditional maritime activity". *Id.* at 268. This Court described traditional maritime activity as "involving navigation and commerce on navigable waters." *Id.* at 272. In *Foremost*, this Court recognized that "the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce". *Id.* at 674-75. Although this Court refused to require that alleged tortfeasors be engaged in commercial activity before they could assert admiralty jurisdiction, this Court cautioned that "[n]ot every accident in navigable waters that might disrupt

maritime commerce will support federal admiralty jurisdiction." *Id.* at 675 n. 5. Accordingly, federal admiralty jurisdiction is limited to certain torts involving maritime commerce which have a significant relationship to traditional maritime activity.

Interpreting the plain language of the *Foremost* decision, the Seventh Circuit concluded:

> The references to 'traditional maritime activity' in *Foremost* always rely upon discussion of 'navigation' or the '*operation* of a vessel' to explain the concept. *Id.* at 674-76 (emphasis supplied). In a key passage, *Foremost* holds that in that case the collision between two pleasure boats on navigable waters fell under admiralty jurisdiction because of '[t]he potential disruptive impact of a collision between boats on navigable waters, *when coupled with* the traditional concern that admiralty holds for navigation.' *Id.* at 675 (emphasis supplied). Thus there is a reasonable basis for concluding that the *Foremost* Court intended to limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation.

Decision at 7a-8a.

Similarly, the Seventh Circuit relied upon references in *Executive Jet*, in which this Court described traditional maritime activity as "navigation or commerce on navigable waters" 409 U.S. at 256, quoted in Decision at 11a, to limit admiralty jurisdiction in non-commercial contexts to torts involving navigation. The Seventh Circuit also relied upon an earlier Supreme Court case, in which this Court noted that if it were to require a cause of action in tort to be of a maritime nature, it would look to "the relation of the wrong to maritime service, to navigation and to commerce on navigable waters." *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62 (1914) (quoted in *Executive*

Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 258 (1972)), Decision at 11a, n.4. Based upon these Supreme Court rulings, the Seventh Circuit ruled that a non-commercial vessel, involved in a fire which does not affect navigation or commercial shipping, lacks the requisite nexus to traditional maritime activity to permit federal jurisdiction.

The Seventh Circuit also referred to the federal interest in protecting commerce and guaranteeing a uniform body of laws to promote and govern maritime commerce. Petitioner demands federal jurisdiction so he can limit his common law tort liability by taking advantage of an admiralty law intended to promote American commercial shipping. The Seventh Circuit recognized the inequity of such a result. The Seventh Circuit wrote: "First and most important, if this sort of fire were to join navigation as a 'traditional concern' of maritime law, it would be nearly impossible to establish any limiting principle with respect to what satisfies the nexus requirement." Decision at 12a-13a. Therefore, based upon this Supreme Court's guiding language, the Seventh Circuit barred from admiralty jurisdiction a non-commercial vessel which caught fire and damaged other non-commercial vessels and a non-commercial dock and which had no impact at all upon commercial shipping. Clearly, the Seventh Circuit's ruling is consistent with, and actually follows, the rulings of this Supreme Court regarding the limited federal jurisdiction over non-commercial torts on navigable waters. This decision does not warrant further review.

III.

The Decision Of The Seventh Circuit Is Consistent With Decisions Of Other Federal Courts Of Appeal.

Petitioner erroneously alleges that the decision of the Seventh Circuit is in sharp contrast with the law in other circuits. Nothing could be further from the truth. The decision of the Seventh Circuit in this case is consistent with the decisions of other federal circuits, all of which rely upon the factors enunciated by this Court in *Executive Jet* and *Foremost* to evaluate the propriety of federal admiralty jurisdiction in each case.

The cases cited by Petitioner illustrate the consistent approach. In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), the court recognized that the facts and circumstances of each claim must evidence a substantial connection with maritime activities in order to invoke federal admiralty jurisdiction. The *Kelly* court enunciated several factors which illustrate traditional maritime activities but rested its decision on the fact that "[t]he party most seriously injured was the pilot, the person responsible for the safe navigation of the river". *Kelly* at 525-26. In *American Eastern Development Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979), the court focused upon whether the boats in question were withdrawn from *navigation*, and ruled that "in determining whether a vessel has been withdrawn from navigation, one must look at its pattern of use". *American Eastern* at 125. Although the Seventh Circuit, in a footnote, declined to adopt the "four factor" test used by several other circuits, Decision at 8a, n.2, the factors applied by the Seventh Circuit involve analysis of the same issues: whether the parties, instrumentalities, injuries and circumstances bear a significant relationship to traditional maritime activity.

The Seventh Circuit restricted its decision to the narrow fact pattern presented in this case, and recognized that a fire aboard a pleasure craft could, in a different case where the fire has an impact upon commerce or navigation, warrant admiralty jurisdiction. By doing so, the Seventh Circuit avoided the broad application which the Petitioner ascribes to the Seventh Circuit. The decision of the Seventh Circuit is consistent with the decisions of other circuits because it is restricted to the facts presented.

IV.

The Limitation Of Liability Act Does Not Provide An Independent Basis For Admiralty Jurisdiction When The Underlying Tort Fails To Qualify As Maritime.

The District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals both rejected Petitioner's claim that the Limitation of Liability Act, 49 U.S.C. §189, *et seq.*, provides an independent basis of federal jurisdiction even though the underlying tort is not maritime. Petitioner relies upon *Richardson v. Harmon*, 222 U.S. 96 (1911) as his sole support. The Seventh Circuit rejected Petitioner's argument, explaining that *Richardson* was decided before the enactment of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740, *et seq.*, which eliminated the need and reason for the rule established by the *Richardson* case. More importantly, when a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing admiralty jurisdiction. The Limitation of Liability Act was intended to support competitive commercial activity by American seagoing vessels. No similar purpose is served by extending jurisdiction to non-maritime torts. Instead, Petitioner is seeking to circumvent

normal tort rules of liability by claiming admiralty jurisdiction over a non-maritime tort. There is no sound judicial basis for doing so and no reason for this Court to review this matter.

V.

The Question Of Whether The Extension Of Admiralty Act Provides An Independent Basis For Admiralty Jurisdiction Was Not Preserved For Appeal.

Petitioner did not argue, plead or allege in the district court or in the appellate court that the Extension of Admiralty Act provides an independent basis for federal jurisdiction. Therefore, this issue was not preserved for appeal. Although this Court may consider jurisdiction at any time, this Court should, in exercising its discretion, refuse to consider this argument.

Alternatively, there is no sound basis in law or policy to allow federal admiralty jurisdiction under this Act where no federal jurisdiction would otherwise exist. This Act merely extends admiralty jurisdiction when the injury occurs on land and corrects an inequity created by the "locality" test, which has since been rejected. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 268 (1972). This Act was not enacted to extend federal jurisdiction where the underlying tort does not qualify as maritime. This argument does not warrant Supreme Court review.

CONCLUSION

Respondents respectfully request that this Court refuse to issue a writ of certiorari.

Respectfully submitted,

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No. 88-2041 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1989

EVERETT A. SISSON, PETITIONER

v.

BURTON B. RUBY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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28 pp

QUESTIONS PRESENTED

1. Whether the Limitation of Liability Act, 46 U.S.C. App. 181 *et seq.* (Supp. IV 1986), confers federal subject matter jurisdiction over a proceeding to limit any tort liability of the owner of a recreational vessel arising from a fire that started aboard the vessel while it was docked at a marina.

2. Whether 28 U.S.C. 1333(1) confers federal admiralty jurisdiction over that proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases-Continued Page

Cases-Continued Page

Cases-Continued — Page

Statutes and rule:

Statutes and rule – Continued — Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2041

EVERETT A. SISSON, PETITIONER

v.

BURTON B. RUBY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Everett A. Sisson was the owner of the Ultorian, a 56-foot pleasure yacht. On September 24, 1985, the Ultorian caught fire while it was docked at the Washington Park Marina in Michigan City, Indiana. The yacht was destroyed, and the fire caused extensive damage to the marina and to other vessels in the vicinity. The owners of the marina and the damaged vessels estimate that their losses exceed $275,000. Pet. App. 1a-2a, 25a.

Petitioner commenced this action in a federal district court to obtain the benefits of the Limitation of Liability

Act, 46 U.S.C. App. 181 *et seq.*[1] The complaint alleged that the fire had occurred without petitioner's privity or knowledge. See 46 U.S.C. App. 183(a). It sought a judgment enjoining the pursuit of claims against petitioner for damages arising from the fire, adjudicating petitioner's liability on those claims, limiting petitioner's total liability to the value of his interest in the Ultorian after the casualty (approximately $800), and dividing that sum among any successful claimants.[2] The complaint invoked "the admiralty and maritime jurisdiction of the United States." Compl., ¶¶ 8, 10, 13, prayer.

2. In orders dismissing the complaint and denying petitioner's motion for reconsideration, the district court held that it lacked subject matter jurisdiction. Pet. App. 25a-35a, 37a-41a. In its initial order, the court held that it lacked general admiralty jurisdiction over the action. The district court noted that, under this Court's decisions in *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668 (1982), and *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), admiralty jurisdiction over tort claims extends only to wrongs that occur on navigable waters and that bear a "significant relationship to traditional maritime activity." Pet. App. 26a-27a. Observing that the instrumentality blamed for the fire, a washer/dryer, was not

[1] All citations to the Limitation of Liability Act are to Supplement IV to the 1982 edition of the United States Code.

[2] Section 183(a) of the Act provides in pertinent part:

> The liability of the owner of any vessel, whether American or foreign, * * * for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"distinctly maritime in character" and that the casualty did not involve the navigation of a vessel, the court held that the matters giving rise to petitioner's potential liability did not bear the necessary relationship to traditional maritime activity. *Id.* at 31a-32a.

In a motion for reconsideration, petitioner argued that the Limitation of Liability Act, 46 U.S.C. App. 183, provided an independent source of subject matter jurisdiction over the action. The district court denied the motion on three alternative grounds: (1) petitioner's jurisdictional theory could not be presented for the first time in a motion for reconsideration; (2) the Limitation of Liability Act does not confer subject matter jurisdiction over non-maritime tort claims; and (3) the Limitation of Liability Act does not apply to a pleasure craft used for recreational purposes. Pet. App. 37a-41a.

3. The court of appeals affirmed. Pet. App. 1a-21a. Addressing first the availability of admiralty jurisdiction under 28 U.S.C. 1333, the court observed that such jurisdiction was not "precluded * * * simply because the tort [in this case] involves pleasure, rather than commercial, vessels." Pet. App. 6a. However, the court of appeals read *Foremost* "to limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation." *Id.* at 7a-8a. Thus, in the court's view, that jurisdiction extends only (*id.* at 8a)

> to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.

Because it determined that this case "involves only non-commercial activities," the panel applied the second

prong of its test. Pet. App. 8a. The court observed that "a fire on board a moored vessel could disrupt commercial navigation," but it adhered to its "narrow reading of 'traditional maritime activity,' limiting application to cases involving navigation." *Id.* at 8a-9a.[3] Since the Ultorian was docked in a marina at the time of the fire, the court held that it lacked admiralty jurisdiction over the action.

The court of appeals also held that the Limitation of Liability Act did not independently confer subject matter jurisdiction over the action. The panel recognized that in *Richardson* v. *Harmon*, 222 U.S. 96 (1911), this Court held that the Act vested district courts with jurisdiction to

[3] The court acknowledged that its approach was not free from doubt. It observed that there were "[s]trong arguments" for a broader view of admiralty jurisdiction; it described as "puzzling" the fact that *Foremost* had defined admiralty jurisdiction by reference to "traditional maritime activity" while focusing on navigation; and it conceded that its understanding of that jurisdiction might be "too narrow and mechanical an interpretation of the Supreme Court." Pet. App. 9a, 12a. The panel also noted that its definition of admiralty jurisdiction differed from the "'four-factor' test" applied in several other circuits. *Id.* at 8a n.2. However, the court of appeals felt "constrained by" the language of this Court's decisions (*id.* at 10a; see *id.* at 12a), and cited several reasons for declining to extend admiralty jurisdiction to "include fires on pleasure craft as a matter of course." *Id.* at 12a. These included the difficulty of establishing any other limiting principle, "widespread scholarly criticism of the exercise of admiralty jurisdiction over pleasure boat torts," and concerns of federalism. *Id.* at 12a-14a.

In a concurring opinion, Judge Ripple maintained that the majority's "test [would] place inappropriate restrictions on admiralty jurisdiction in other instances." Pet. App. 21a. In his view, *Foremost* did not restrict admiralty jurisdiction in non-commercial cases to "matters directly involving the navigation of a vessel" or preclude "jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce." *Ibid.* He concurred in the judgment, however, on the ground that the fire in this case – in a marina "dedicated exclusively to the wharfage of pleasure boats" – posed no such threat. *Ibid.*

entertain proceedings to limit liabilities arising from non-maritime torts. However, the court of appeals ruled that the enactment of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. 740, eliminated "the need that inspired that decision," and it questioned whether cases predating *Executive Jet* and *Foremost* retained their precedential force. Pet. App. 16a-17a. The court concluded that the "nexus" required for admiralty jurisdiction was also a prerequisite for jurisdiction under the Limitation of Liability Act. The court explained that "when a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing the Limitation of Liability Act – which provides for a practice apparently defensible only in a traditional maritime context – to provide an independent basis for admiralty jurisdiction." *Id.* at 18a.[4]

DISCUSSION

The court of appeals' holding that federal courts lack jurisdiction over non-maritime tort claims in limitation of liability proceedings conflicts with this Court's decision in *Richardson* v. *Harmon*, *supra*, and the decisions of lower federal courts. In addition, the court of appeals employed criteria different from those applied in other circuits to determine whether the casualty in this case bore the "significant relationship to traditional maritime activity" required for general federal admiralty jurisdiction. Although the practical impact of these differing standards remains

[4] Because it held that the court lacked subject matter jurisdiction over this action, the court of appeals did not address the question whether the Limitation of Liability Act applies to pleasure vessels. See Pet. App. 20a n.11. The court noted that the lower federal courts have divided on that question.

unclear, the conflict has been perceived as significant in the lower courts.

We believe that this Court's review is warranted because of the conflict with *Richardson*, and because there is a need to dispel confusion as to the reach of the Court's decisions in *Executive Jet* and *Foremost*. If the Court does decide to grant review, it may also wish to direct the parties to brief the issue whether *Richardson* should be reconsidered. Although there are substantial arguments on both sides of that issue, the appropriateness of applying the Limitation of Liability Act to non-maritime tort claims is, in our view, a matter that deserves fresh consideration.

The scope of the district courts' general admiralty jurisdiction over maritime torts need not be reached if the Limitation of Liability Act applies to—and independently confers subject matter jurisdiction over—this case. Accordingly, we address that issue first.

1. Section 183(a) of the Limitation of Liability Act, 46 U.S.C. App. 183(a), provides that "[t]he liability of the owner of any vessel" for any damages occasioned without the owner's "privity or knowledge" shall not exceed "the amount or value of the interest of such owner in such vessel, and her freight then pending." To enforce that limitation, an owner is authorized by Section 185 of the Act, 46 U.S.C. App. 185, to "petition a district court of the United States of competent jurisdiction" to limit his liability. When (as in this case) there are multiple claims against the owner and the amount of those claims exceeds the value of his interest in the vessel, the court has authority to enjoin the commencement and prosecution of any other actions arising out of the casualty; to determine whether the owner is entitled to the statutory limitation on liability (which in many cases turns on whether the casualty was within his "privity or knowledge"); to adjudicate claims

against the owner or vessel; and to apportion the owner's interest in the vessel among successful claimants in proportion to their claims. See G. Gilmore & C. Black, *The Law of Admiralty* § 10-17 (2d ed. 1975). Federal jurisdiction over such a proceeding is exclusive. *See Providence & New York Steamship Co.* v. *Hill Manufacturing Co.*, 109 U.S. 578, 594-595 (1883).

Here, the court of appeals held that exclusive federal jurisdiction does not extend to tort claims that lack a "significant relationship to traditional maritime activity." Although the court framed the question as one of federal jurisdiction, the issue may just as properly be viewed as one of the substantive reach of the Act. The statute has been construed to provide for a proceeding in which the fund available to satisfy a shipowner's liability may be apportioned among all claims subject to the owner's limitation on liability. *See Just* v. *Chambers*, 312 U.S. 383, 386 (1941). Thus, in our view, the scope of federal jurisdiction under the Limitation of Liability Act is the same as the scope of the liabilities that are subject to limitation.[5] The question presented by this case, then, is whether the Act applies to liabilities arising from non-maritime claims.

In its early decisions under the Act, this Court determined that the statute was to be administered by federal courts sitting in admiralty and construed it to apply only to liabilities within the general admiralty jurisdiction of those courts. In *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) 104 (1871), the Court resolved the question, on which the statute was silent, of the appropriate forum for enforcement

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[5] In the admiralty setting, issues of jurisdiction and the reach of substantive rules of law are linked. "With admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp.* v. *Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986).

of the Act. The Court concluded (*id.* at 123-124):

> The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take "*the appropriate proceedings in any court*, for the purpose of apportioning the sum for which, &c." Now, no court is better adapted than a court of admiralty to administer precisely such relief. * * * Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter * * *.[*]

Consistent with *Norwich*'s observation that the district courts had jurisdiction over limitation of liability actions, "as courts of admiralty and maritime jurisdiction," this Court later held that federal court jurisdiction in such proceedings (and thus, of necessity, the substantive reach of the Act itself) extended only to maritime liabilities on which suit could have been brought on the admiralty side of the federal district courts. In *Ex parte Phenix Insurance Co.*, 118 U.S. 610 (1886), the owner of a steamer sought to

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[*] In view of the Act's silence on matters of procedure in proceedings under the Act, this Court took the extraordinary step of announcing its intention to promulgate rules to regulate those proceedings. *Id.* at 125. The Court subsequently issued "Supplementary Rules in Admiralty" which, with some amendments, are now codified as Supplemental Rule F, Fed. R. Civ. P. See G. Gilmore & C. Black, *supra*, § 10-14.

litigate the question of its negligence, and to limit its liability for damages, in connection with a fire caused by sparks from the steamer's smokestack. Because the fire occurred on land, claims for resulting damages fell outside federal admiralty jurisdiction as then defined. *Id.* at 618-619. See *The Plymouth*, 70 U.S. (3 Wall.) 20, 35 (1865). The Court noted that the predecessor of Section 183(a) "[did] not purport to confer any jurisdiction upon a District Court" and that the predecessor of Section 185 referred only to "any court of competent jurisdiction," "leaving the question of such competency to depend on other provisions of law." 118 U.S. at 617. The court held, accordingly, that neither the Limitation of Liability Act nor the Admiralty Rules promulgated by the Court extended the general admiralty jurisdiction of the district courts to a proceeding to limit a vessel owner's liability for a non-maritime tort. The Court added that nothing in its earlier decisions "support[ed] the view that a District Court can take jurisdiction in admiralty of a petition for a limitation of liability where it would not have had cognizance in admiralty originally of the cause of action involved." *Id.* at 624.

Similarly, in *Butler* v. *Boston Steamship Co.*, 130 U.S. 527, 557 (1889), the Court observed that "the law of limited liability of shipowners is a part of our maritime code," and "is necessarily coextensive with that of the general admiralty and maritime jurisdiction." Under the regime of *Norwich*, *Ex parte Phenix*, and *Butler*, therefore, the scope of the liabilities subject to the Limitation of Liability Act was defined by reference to the general admiralty jurisdiction of the federal courts.

In *Richardson* v. *Harmon*, *supra*, however, the Court uncoupled the Limitation of Liability Act from general admiralty jurisdiction. In that case, the owners of a steam barge sought to limit their liability arising out of a collision

between the barge and a bridge. Because the bridge was considered to be "on land" for purposes of admiralty jurisdiction, a claim for damage to the bridge was non-maritime under the "locality" test of *The Plymouth*, *supra*. The Court acknowledged that, prior to the effective date of an 1884 amendment to the Limitation of Liability Act (an amendment now codified at 46 U.S.C. App. 189), the district court would have had no jurisdiction to limit the barge owner's liability for damage to the bridge. However, the Court construed the 1884 amendment to extend the Limitation of Liability Act–and, implicitly, federal jurisdiction in proceedings under the Act–to "'any and all debts and liabilities' not theretofore included"–including non-maritime tort claims. 222 U.S. at 105. "Thus construed," the Court explained, "the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts." *Id.* at 106.

After *Richardson*, it was frequently held that "[p]roceedings by vessel owners to limit their liability as permitted by [the Limitation of Liability Act] are within the admiralty jurisdiction even if the claims limited against might not be sued upon in admiralty." 1 S. Friedell, *Benedict on Admiralty* § 225 (7th ed. 1988). See *Just* v. *Chambers*, 312 U.S. at 386 (Limitation of Liability Act "extends to tort claims even when the tort is non-maritime"); *The No. 6*, 241 F. 69 (2d Cir. 1917); *The Rochester*, 230 F. 519, 521 (W.D.N.Y. 1916); *The Irving F. Ross*, 8 F.2d 313 (D. Mass. 1923); *In re Highland Nav. Corp.*, 24 F.2d 582 (S.D.N.Y. 1927); *The Atlas No. 7*, 42 F.2d 480 (S.D.N.Y. 1930); *In re Colonial Trust Co.*, 124 F. Supp. 73,

75 (D. Conn. 1954); *The Trim Too*, 39 F. Supp. 271, 273 (D. Mass. 1941).[7]

By contrast, the court of appeals' decision in this case holds that the Limitation of Liability Act is restricted to maritime tort liabilities over which federal jurisdiction would lie under 28 U.S.C. 1333. The Eleventh Circuit has since reached the same conclusion on very similar facts. *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989).[8] These decisions are inconsistent with the Second Circuit's decision in *The No. 6*, *supra*, and district court decisions that have followed *Richardson*.

The decisions in this case and *Lewis Charters* have suggested that *Richardson* is no longer controlling in light of two intervening developments in the scope of admiralty tort jurisdiction: (1) the enactment of the Extension of Admiralty Act, 46 U.S.C. 740, which extends the original maritime jurisdiction of the district courts to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land," and (2) this Court's decisions, in *Executive Jet* and *Foremost*, requiring a "significant relationship to traditional maritime activity" for federal admiralty jurisdiction, see pp. 16-17, *infra*.

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[7] In 1936, Congress amended the Act by adding the provision now codified at 46 U.S.C. App. 185. That amendment dealt with some of the procedural matters that had previously been addressed only by the Admiralty Rules. There is no indication in the language of the Section or its history that it was intended to alter the jurisdictional regime established by *Richardson* v. *Harmon*. See H.R. Rep. No. 2517, 74th Cong., 2d Sess. (1936); S. Rep. No. 2061, 74th Cong., 2d Sess. (1936).

[8] There were two similar district court decisions prior to the decision in this case. *Clinton Board of Park Commissioners* v. *Claussen*, 410 F. Supp. 320 (S.D. Iowa 1976); *Yacht Calibria*, 1975 A.M.C. 981 (D. Md. 1975).

We disagree. In our view, *Richardson* squarely rejected the proposition that district courts may not take jurisdiction over non-maritime tort claims in limitation of liability proceedings. The fundamental basis for that holding, the 1884 amendment to the Limitation of Liability Act, remains on the books as 46 U.S.C. App. 189. And, *Executive Jet* expressly recognized that the "significant relationship to traditional maritime activity" standard would not apply when there was "legislation to the contrary." 409 U.S. at 268, 274 & n.26.[9]

We believe that the conflict between the court of appeals' decision and *Richardson* warrants further review. The effort of the court below to distinguish *Richardson* does not stand in isolation; the court's approach is already being followed by the Eleventh Circuit. And a number of lower court decisions, especially involving pleasure boat incidents, have sought to limit the reach of the Limitation of Liability Act in ways that seem to us hard to square with *Richardson*'s rationale (see notes 10, 12, *infra*).

If the Court decides to hear this case, there are several reasons why it may wish to direct the parties to address the question whether *Richardson* should be modified or overruled. First, the original basis for that decision is subject to question. Notwithstanding its open-ended language, the Limitation of Liability Act was initially understood to be a part of the "maritime code" and thus to be coextensive with the general admiralty jurisdiction of the federal courts. See pp. 7-9, *supra*. The language of the 1884 amendment on which *Richardson* was based does not seem to justify a

[9] To be sure, *Richardson* involved the rule excluding from maritime tort jurisdiction injuries occurring on "land," rather than the "significant relationship" standard that the court of appeals applied here. However, we believe that the reasoning of *Richardson* does not support a distinction between these two criteria.

fundamentally different view of the relationship between the Act and that jurisdiction.[10] Second, insofar as the extension of the Act to non-maritime claims in *Richardson* was based on concern with artificial limitations on admiralty jurisdiction arising from the "locality" test, the Extension of Admiralty Act has ameliorated that concern. Third, as the court of appeals noted, the "great object of the [Limitation of Liability Act] was to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) at 121. See 3 A. Jenner & J. Loo, *Benedict on Admiralty* §§ 6-7 (7th ed. 1988). That purpose was the principal basis for the

[10] The original Act, codified at 46 U.S.C. App. 183(a), limited the vessel owner's liability for "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner" to "the amount or value of the interest of such owner in such vessel, and her freight then pending." The 1884 amendment, codified at 46 U.S.C. App. 189, limited the shipowner's liability "to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole." The sparse legislative history of the provision, while suggesting that the amendment was intended to provide protection from contractual liability, 15 Cong. Rec. 3971 (1884) (remarks of Senator Vest), does not indicate a substantial increase in the Act's scope. See *Butler* v. *Boston S.S. Co.*, 130 U.S. at 554 (suggesting that it was "possible" that the amendment "was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without the privity or knowledge of the owner").

Even after *Richardson*, the courts have refused to apply the Limitation of Liability Act to cases having no relationship to navigable waters. *E.g.*, *In re Three Buoys Houseboat Vacations U.S.A., Ltd.*, 878 F.2d 1096 (8th Cir. 1989); *Marroni* v. *Matey*, 492 F. Supp. 340 (E.D. Pa. 1980); *In re Howser's Petition*, 227 F. Supp. 81 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960); *In re Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965). These decisions are difficult to square with *Richardson*. We believe that they reflect a reluctance to sever completely any tie between the Limitation of Liability Act and general admiralty jurisdiction.

decision in *Richardson*. Under the "locality" test for admiralty jurisdiction that then prevailed, restricting limitation of liability proceedings to claims cognizable in admiralty would have left shipowners exposed to many foreseeable claims arising from the normal commercial operation of their vessels. By contrast, allowing limitation of liability for claims arising from wrongs having no "significant relationship to traditional maritime activity" seems unnecessary to advance the interests of the merchant marine.[11] Finally, because the jurisdiction of the limitation court in cases of this type is exclusive, the consequence of federal jurisdiction is to subject tort claims arising under state law to the statutory cap and to bring them to federal court. In a case that does not satisfy the "significant relationship" test, any federal interest in the scope of a shipowner's liability for such claims or in adjudication of that liability in a federal forum is attenuated.

We by no means suggest that the question is one-sided. The language of the Limitation of Liability Act does not expressly limit it to maritime claims. Thus, as was the case prior to *Richardson*, such a limitation would have to be derived from the original understanding of the Act's relation to the admiralty jurisdiction of the courts responsible for the Act's administration. Moreover, a very broad view of the Act's purpose of advancing commercial shipping might support its application to non-maritime liabilities; if so, federal courts should have jurisdiction over such claims in order to perform their function of assuring a comprehensive adjudication of multiple claims against a

[11] See also *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 437 (1954) (Black, J., dissenting) ("Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail.").

shipowner and an orderly distribution of the sum earmarked for his liabilities. See *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 416 (1954); *Just* v. *Chambers*, 312 U.S. at 385-386; *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207, 215-216 (1927). On balance, however, we believe that the concerns raised by *Richardson* are sufficient to warrant reconsideration of that decision.[12]

[12] As the court of appeals noted (Pet. App. 20a n.11), there is a conflict on the question whether the Limitation of Liability Act applies to pleasure yachts. The weight of authority supports such application. *In re Hechinger*, 890 F.2d 202 (9th Cir. 1989); *In re Young*, 872 F.2d 176 (6th Cir. 1989); *Gibboney* v. *Wright*, 517 F.2d 1054 (5th Cir. 1975); *The Oneida*, 282 F. 238 (2d Cir. 1922); *Feige* v. *Hurley*, 89 F.2d 575 (6th Cir. 1937); *Warnken* v. *Moody*, 22 F.2d 960, 962 (5th Cir. 1927); *In re Brown*, 536 F. Supp. 750 (N.D. Ohio 1982); *Armour* v. *Gradler*, 448 F. Supp. 741, 748-750 (W.D. Pa. 1978); *In re Theisen*, 349 F. Supp. 737 (E.D.N.Y. 1972); *In re Klarman*, 295 F. Supp. 1021 (D. Conn. 1968); *In re Landi*, 194 F. Supp. 353 (S.D.N.Y. 1960); *In re Reading*, 169 F. Supp. 165 (N.D.N.Y. 1958), aff'd, 271 F.2d 959 (2d Cir. 1959); *In re Colonial Trust Co.*, 124 F. Supp. at 75; *The Trim Too*, 39 F. Supp. at 273. See 3 A. Jenner & J. Loo, *supra*, § 47, at 5-43 to 5-44 & n.5. Cf. *Coryell* v. *Phipps*, 317 U.S. 406 (1943); *Just* v. *Chambers*, *supra* (apparently assuming that the Act applied to pleasure boats). However, a growing number of district court decisions have held to the contrary. *Estate of Lewis*, 683 F. Supp. 217 (N.D. Cal. 1987); *In re Shaw*, 668 F. Supp. 524 (S.D.W. Va. 1987); *In re Lowing*, 635 F. Supp. 520 (D. Mich. 1986); *In re Tracey*, 608 F. Supp. 263 (D. Mass. 1985); *Baldassano* v. *Larsen*, 580 F. Supp. 415 (D. Minn. 1984); *Kulack* v. *The Pearl Jack*, 79 F. Supp. 802 (W.D. Mich. 1948). See also *The Mamie*, 5 F. 813 (E.D. Mich.), aff'd on other grounds, 8 F. 367 (C.C.E.D. Mich. 1881).

In our view, the text of the Act strongly supports the conclusion that it applies to pleasure boats. By its terms, Section 183(a) extends the benefits of the Act to "the owner of any vessel" who can satisfy its other conditions. Section 188 provides that the Act shall apply to "all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters." For purposes of the United States Code, the term "vessel" includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3.

2. If the Limitation of Liability Act applies only to tort liabilities that bear a "significant relationship to traditional maritime activity," this case would present the question of the application of that standard.[13] That question in turn would require consideration of this Court's decisions in *Executive Jet*, and *Foremost*, *supra*.

In *Executive Jet*, this Court held that unless the "wrong" involved in a plane crash bears "a significant relationship to traditional maritime activity," claims arising from the crash "are not cognizable in admiralty in the absence of legislation to the contrary." 409 U.S. at 268; see *id.* at 274. In *Foremost*, a case involving a collision between two pleasure boats, the Court established that this "significant relationship" standard applies outside the aviation context (at least where the tort does not occur on the high seas) but also made clear that "there is no requirement that 'the maritime activity be an exclusively commercial one.'" 457 U.S. at 674. The Court held that "[i]n light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat, * * * a complaint alleging

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Finally, Section 183(f) provides that for purposes of Sections 183(b)-(e) and 183b, the term "seagoing vessel" does not include "pleasure yachts." The strong implication of this language is that "pleasure yachts" are not excluded *per se* from the category of vessels to which Section 183(a) applies.

Thus, while there are compelling policy arguments against application of the Limitation of Liability Act to pleasure yachts, those arguments appear to be foreclosed by the language of the Act.

[13] We assume that all claims as to which petitioner seeks the benefits of the Limitation of Liability Act sound in tort. The "significant relationship" test in *Executive Jet* and *Foremost* applies only to such claims.

a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts." *Id.* at 677.

Foremost did not describe the nature of the "significant relationship to traditional maritime activity" that would suffice to support jurisdiction in cases, like this one, that do not involve the navigation of vessels. In determining whether such a relationship exists, most courts of appeals have adopted some variant of the four-factor test first recognized by the Fifth Circuit in *Kelly* v. *Smith*, 485 F.2d 520, 525 (1973), cert. denied, 416 U.S. 969 (1974). Under that test, a court considers (485 F.2d at 525)

> the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of injury; and traditional concepts of the role of admiralty law.[14]

In this case, the panel majority expressly rejected that test, saying that it was not "helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*." Pet. App. 8a n.2. Instead, it concluded that in the absence of

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[14] See, *e.g.*, *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007, 1015-1016 (1st Cir. 1985); *Eagle-Picher Indus., Inc.* v. *United States*, 846 F.2d 888, 896 (3d Cir. 1988); *Oman* v. *Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985); *Woessner* v. *Johns-Manville Sales Corp.*, 757 F.2d 634, 639-649 (5th Cir. 1985); *Guidry* v. *Durkin*, 834 F.2d 1465, 1471 (9th Cir. 1987); *In re Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir. 1986); *Myhran* v. *Johns-Manville Corp.*, 741 F.2d 1119, 1121 (9th Cir. 1984); *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 783-787 (11th Cir. 1984).

The First and Fifth Circuits have refined the last of the four factors. In its place, they now consider "(1) the impact of the event on maritime shipping and commerce (2) the desirability of a uniform national rule to apply to such matters and (3) the need for admiralty 'expertise' in the trial and decision of the case." *Molett* v. *Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987); see *Shea* v. *Rev-Lyn Contracting Co.*, 868 F.2d 515, 518 (1st Cir. 1989).

a direct effect on maritime commerce, admiralty jurisdiction should extend only to those activities that (1) have a potentially disruptive impact on commercial shipping *and* (2) involve navigation. *Ibid.* There is thus a conflict among the circuits on the standards being applied to determine the existence of the "significant relationship" required to sustain admiralty jurisdiction over tort claims.[15]

Though the "four factor test" seems to envisage that admiralty jurisdiction will be available to a greater degree than under the Seventh Circuit's approach, it is difficult to ascertain at this juncture the extent to which these conflicting approaches will actually lead to differing results. In keeping with this Court's emphasis in *Foremost* on the "need for uniform rules governing navigation," even those courts committed to the "four-factor test" have placed great emphasis on allegations that an injury has arisen from an error in navigation. When a complaint has included such allegations, the courts have usually found jurisdiction even in cases involving the operation of non-commercial vessels.[16]

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[15] *American Eastern Devel. Corp.* v. *Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979), on which petitioner relies heavily (Pet. 8-10), is not on point; that case arose in contract rather than in tort.

[16] *Hogan* v. *Overman*, 767 F.2d 1093, 1094 (4th Cir. 1985) (admiralty jurisdiction extends to suit by waterskier against operator of tow boat on ground that "negligent operation of a vessel is alleged"); *Oliver by Oliver* v. *Hardesty*, 745 F.2d 317 (4th Cir. 1984) (suit by swimmer against operator of boat); *Medina* v. *Perez*, 733 F.2d 170 (1st Cir. 1984) (admiralty jurisdiction extends to suit by swimmers against small powerboat since suit involves navigation, "the most fundamental" of maritime activities); *Finneseth* v. *Carter*, 712 F.2d 1041 (6th Cir. 1983) (collision between pleasure craft on lake formed by a dam); See also *Souther* v. *Thompson*, 754 F.2d 151 (4th Cir. 1985) ("allegation of a navigational error appears to be the key to admiralty jurisdiction when dealing with small pleasure craft;" jurisdiction found lacking because accident at issue did not "arise out of an alleged navigational error"); *St. Hilaire Moye* v. *Henderson*, 496 F.2d 973, 979 (8th Cir.) ("the operation of a boat on navigable waters, no matter what its size or activity, is a traditional maritime activity to which the admiralty jurisdiction of the federal courts may extend"), cert. denied, 419 U.S. 884 (1974).

Conversely, the courts have been reluctant to find jurisdiction in cases, like this one, in which an injury has not arisen from an alleged navigational error. See *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *Lloyds of London* v. *Montauk Yacht Club & Inn*, 704 F. Supp. 1175 (E.D.N.Y. 1989).[17]

Thus, the practical significance of the differing standards being employed in the courts of appeals remains unclear. Nevertheless, we believe that the conflict calls for this Court's review. The conflict has been perceived as significant. One court has criticized the approach applied by the panel here as "an indefensibly narrow reading of *Foremost Insurance.*" *In re Young*, 872 F.2d 176, 178-179 n.4 (6th Cir. 1989). Moreover, although joining in the court's judgment, the concurring judge on the panel also expressed concern that its test would "place inappropriate restrictions on admiralty jurisdiction in other instances." Pet. App. 21a (Ripple, J., concurring). Because *Foremost* provides modest guidance with respect to cases that do not involve navigation or commercial shipping, it seems likely that dispute and uncertainty over the content of the "significant relationship" test will persist if the matter does not receive this Court's attention.[18] Such uncertainty over the

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[17] In *Lewis Charters*, the Eleventh Circuit applied the four-factor test described above to a claim by the owner of a marina against a boat owner whose negligence was allegedly responsible for a fire. The court reached the same result as the court of appeals in this case.

[18] The petition also presents the question whether jurisdiction could be founded upon the Extension of Admiralty Act, 46 U.S.C. 740. However, that issue was not raised or decided in the court of appeals

proper scope of admiralty jurisdiction and maritime law runs counter to the interest of courts and litigants in the expeditious determination of controversies on their merits. See Z. Chafee, *Some Problems of Equity* 310-316 (1950).

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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Deputy Solicitor General
STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

JANUARY 1990

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or the district court.

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No. 88-2041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In the Matter of:

The Complaint of Everett A. Sisson, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,

Petitioner,

—v.—

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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19pp

QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. § 1333 and Article III, Section 2, of the Constitution.

2. Whether the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*, provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. § 1333.

3. Whether the Extension of Admiralty Act, 46 U.S.C. § 740, provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. § 1333.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Everett Sisson was the owner of a 56′ yacht known as the M/V ULTORIAN which he docked at Washington Park Marina in Michigan City, Indiana. On September 24, 1985, a fire erupted on board the yacht destroying the vessel and causing damage to the marina and several neighboring boats. It is believed that the fire was caused by a defective washer/dryer unit on board the yacht, the negligent installation of the unit and/or the defective construction of the ventilation system for the washer/dryer unit.

As a result of the fire, claimants asserted claims against Everett Sisson for amounts in excess of $275,000. The value of the ULTORIAN before she was nearly totally destroyed was approximately $600,000. After the fire her value was $800.

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by Everett A. Sisson.

NATURE OF MLA'S INTEREST

MLA has a very strong interest in the disposition of this case. It is a nationwide bar association founded in 1899, having a membership of about 3700 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA'S attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, terminal operators, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for its discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the eighty-nine years of its existence, has sponsored a wide range of legislation dealing with maritime matters and has also cooperated with Congressional committees in the formulation of other maritime legisation.[1]

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1 E.g., Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted* in 6 Benedict on Admiralty, Doc. No. 3-4 at 3-34.1-78.2 (7th ed. 1988), see 33 C.F.R. ch. 1, subch, D, Special Note, at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073; Shipowner's Limitation of Liability Bill, H.R. 277, 99th Cong., 1st and 2nd Sess. (1985, 1986).

MLA believes uniformity in maritime law is of great importance. This concern has been repeatedly expressed by its membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken to persuade Congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[2] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[3]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four accepted by the United States Supreme Court.[4]

It is the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The Seventh Circuit Court of Appeals has severely limited admiralty and maritime juris-

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2 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

3 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

4 *Chick Kam Choo v. Exxon Corp.*, ____ U.S. ____, 56 L.W. 4436, 108 S.Ct. 1684, 100 L.Ed. 2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

diction in a way which seriously diverges from and conflicts with other circuits and too narrowly construes the decisions of this Court in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, (1972) and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). It would also have the effect of denying a vessel owner his right to seek limitation of liability, which can properly be sought only in a federal district court. Both aspects of the *Sisson* decision would adversely affect uniform interpretation and application of the admiralty and maritime law.

SUMMARY OF ARGUMENT

In this case involving important issues of admiralty and maritime jurisdiction in tort (a fire on a moored yacht damaging other moored non-commercial vessels and the dock) in a limitation of liability proceeding:

1. The Seventh Circuit has misconstrued this Court's decisions on admiralty jurisdiction (*Executive Jet* and *Foremost*) far too narrowly by requiring either the involvement of commercial maritime activity or, as to non-commercial vessels, a showing of both (a) potentially disruptive impact on maritime commerce and (b) navigation as the only acceptable "traditional maritime activity."

2. As evidenced by disagreements within the Seventh Circuit Panel, its tests to determine jurisdiction would be extremely difficult and uncertain of application, contrary to the requirements of *Foremost*.

3. There is substantial conflict among the circuits on the question of admiralty and maritime jurisdiction over pleasure boat casualties which this Court should resolve (Rule 17.1(a)).

4. Even if a non-maritime tort were involved in this case, the Seventh Circuit erred in failing to follow the clearly applicable precedent of *Richardson v. Harmon*, 222 U.S. 96 (1911), which permitted a vessel owner to seek limitation of liability in admiralty with respect to a non-maritime tort. Thereby Sisson was deprived of his statutory right to seek such limitation.

ARGUMENT

A. In a Case Involving the Important Issue of the Extent of Admiralty and Maritime Jurisdiction over a Casualty Affecting Several Vessels on Navigable Water at a Marina, the Seventh Circuit Erroneously Construed *Executive Jet* and *Foremost* Too Narrowly, Thereby Unjustifiably Denying such Jurisdiction.

Prior to 1972 this case clearly would have been within admiralty jurisdiction inasmuch as the casualty occurred on navigable waters. *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866). However, in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), a case involving an airplane crash in Lake Erie, which bore "no relationship to traditional maritime activity," *id.* at 273, this Court held:

> [I]n the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.

Id. at 274. The Court noted that the Death on the High Seas Act might be "legislation to the contrary" in an appropriate case. *Id.* n.26.

In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a case involving a collision of two pleasure boats on navigable waters, this Court recognized that the requirement that the wrong have a significant connection with traditional maritime activity is not limited to aviation and there is no requirement that the maritime activity be exclusively commercial. Because the "wrong" in *Foremost* involved negligent operation of a vessel on navigable waters, the court believed there was a significant nexus to traditional maritime activity to sustain admiralty jurisdiction. *Id.* at 674. It concluded:

> In light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a

> jurisdictional test tied to the commercial use of a given boat, we hold that a complaint alleging a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts.

Id. at 677.

In *Sisson*, in view of the many references to "navigation" or "operation" of a vessel in *Foremost*, the Seventh Circuit said there is a reasonable basis to conclude that this Court intended to limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation. 7a-8a.[5] It interpreted *Foremost* to confine admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation. 8a, 11a-12a. It concluded that part (1) of its test had been met in that a fire on a moored vessel could disrupt commercial navigation but, as navigation was not involved, there was no jurisdiction. 8a, 11a-12a.

The Seventh Circuit conceded that it applied a narrow reading to "traditional maritime activity" in limiting its application to cases involving navigation. It admitted that strong arguments exist for a broader interpretation and that, logically, fires aboard moored vessels are as much a traditional maritime concern as errors of navigation. 9a.

The Seventh Circuit also expressed puzzlement at *Foremost's* frequent use of the phrase "traditional maritime activity" in discussions dealing with navigation, but apparently concluded that "traditional maritime activity" is equated only to "maritime commerce," "navigation," or "operation of a vessel." 9a, 11a.

We respectfully submit that the Seventh Circuit relied too much on this Court's focus on "navigation" in *Foremost*

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5 The case is reported as *Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989), but for convenience our page citations to the Seventh Circuit's opinion (and our later references to the limitation statutes) refer to the Petition's Appendix.

which, after all, as a collision case, was necessarily concerned with navigation as the obviously relevant traditional maritime activity. And we suggest that the Seventh Circuit gave excessive weight to only the first sentence of a *Foremost* footnote in determining ultimately to require "navigation" as a necessary "second *Foremost* criterion" requirement for jurisdiction. 8a, 9a. The full footnote from *Foremost* on which the Seventh Circuit relied reads as follows:

> Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction. In *Executive Jet*, for example, we concluded that the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity. *However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate.*

457 U.S. at 675, n.5 (emphasis added). In context, the last sentence of the note makes it reasonably plain that "the navigation of the boats in this [*Foremost*] case" was merely the pertinent traditional maritime activity therein, rather than the only one that could possibly suffice, as the Seventh Circuit concluded.

Certainly, the natural meaning of "traditional maritime activity" is broader than the Seventh Circuit utilizes in *Sisson*, as that Court itself recognized. 9a. In the context of *Sisson* numerous traditional maritime activities or concerns, actual and potential, are involved, namely: mooring a vessel; seaworthiness—here involving preventing or detecting fire in a vessel; preventing fire from spreading internally; and preventing its spreading to other vessels or the dock, perhaps by moving the burning vessel or the nearby vessels (possibly arranging towage for such a move or, indeed, salvage services). All of these are clearly traditional maritime activities. Coupled with the Seventh Circuit's conclusion that the fire "could disrupt" commercial navigation [criterion (1)], we submit that any one,

or a combination, of the aforesaid traditional maritime activities should have sufficed to ground maritime jurisdiction under *Foremost*, unless the Seventh Circuit was correct when it inferred that "navigation" was a *sine qua non*.

We respectfully submit that, in so inferring, the Seventh Circuit erred. And we note that in that respect Judge Ripple would agree. 21a.[6]

B. The Seventh Circuit's Tests are Unsatisfactory in that They Would Be Difficult to Apply and Would Ground Jurisdiction Uncertainly on Fortuitous Circumstances.

The difficulties inherent in the Seventh Circuit's test are illustrated by the *Sisson* opinions themselves—the Panel apparently splitting 2–1 on two issues: (a) whether the fire had a potentially disruptive impact on maritime commerce and (b) whether navigation was the required traditional maritime activity.

Judge Ripple concluded the fire presented no harm to maritime commerce because it occurred in a marina dedicated exclusively to the wharfage of pleasure boats. 21a. But would his view have changed if some of those pleasure boats were regularly chartered out for hire (a commercial activity)? Or if a dock with commercial vessels had been immediately adjacent? Or 200 yards away? Would the size of the fire or the direction of wind or current be a factor in whether harm was presented?

Such questions (there could be more) illustrate the uncertainty of the *Sisson* tests and their dependence on fortuitous circumstances which could lead to inconsistent findings or denials of admiralty jurisdiction. *Foremost* wisely warned against such tests and declined to inject the uncertainty inherent in such line-drawing into maritime transportation. 457 U.S. at 675-676.

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6 Judge Ripple concurred in the result because he thought the fire presented no harm to maritime commerce, 21a, but, as the majority pointed out, *inter alia*, the fire could have spread from the marina across oil-covered water to threaten or obstruct commercial traffic. 8a.

C. There Is Clear Divergence and Conflict Among the Circuits on This Question of Jurisdiction, and This is an Appropriate Case for the Court to Resolve such Conflict.

Sisson interprets *Foremost* as limiting admiralty's jurisdiction in non-commercial maritime tort cases to those where the wrong both (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.

In *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied* 416 U.S. 969 (1974), the Fifth Circuit established a four factor test for determining admiralty jurisdiction: (a) the functions and roles of the parties, (b) the types of vehicles and instrumentalities involved, (c) the causation and the type of injury, and (d) traditional concepts of the role of admiralty law. The Seventh Circuit in *Sisson* expressly refused to adopt the "four factor test" although acknowledging its use in the Fourth, Fifth, Ninth and Eleventh Circuits, as the Seventh Circuit did not find it helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*. 8a, n.2.

Without abandoning *Kelly v. Smith*, the Fifth Circuit has added three other indicia "divined from *Executive Jet* and *Foremost*" in determining jurisdiction: (1) impact of the event on maritime shipping and commerce, (2) desirability of a uniform national rule to apply to the matter, and (3) the need for admiralty "expertise." *Molett v. Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987).

The Eighth Circuit probably has given the broadest test of admiralty jurisdiction with respect to pleasure boat torts in *St. Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8 Cir. 1974), *cert. denied*, 419 U.S. 884 (1974), where it stated:

> [T]he operation of a boat on navigable waters, no matter what its size or activity, is a traditional maritime activity to which the admiralty jurisdiction of the federal courts may extend.

Other courts have viewed *Foremost* as requiring consideration of a range of factors, including, but not limited to, navi-

gation. In *Com; aint of Sheen*, 709 F. Supp. 1123, 1129 (S.D. Fla. 1989), the Court, in discussing the scope of admiralty jurisdiction, stated:

> Generally, a determination of maritime flavor requires a consideration of three issues: (1) the impact upon maritime shipping and commerce; (2) the desirability of a uniform national rule, and, (3) the need for one central admiralty authority.

The court cited *Foremost* for the foregoing and noted that courts after *Foremost* have found its directives too abstract and have generally followed the guidelines of *Kelly v. Smith*, *supra* 9. *Ibid.*

The Sixth Circuit has criticized *Sisson's* "indefensibly narrow reading of *Foremost*." *In re John Young*, 872 F.2d 176, 179, n.4 (6th Cir. 1989).

Finally, in *Sisson* itself, Judge Ripple, in his concurring opinion denying a rehearing and inviting further guidance, commented:

> Before this court revisits the area again, there is every probability that the Supreme Court will have an opportunity to supply further guidance with respect to its decision in *Foremost*.

23a.

We respectfully submit that it would be most appropriate for this Court to supply such guidance in this very case and thereby resolve the intercircuit conflict and uncertainty.

D. The Seventh Circuit also Erred in Denying Jurisdiction which is Based on Applicability of the Limitation of Liability Act.

Even if there were no admiralty and maritime jurisdiction under more general principles, there is jurisdiction by virtue of the action being brought under the Limitation of Liability Act, 46 U.S.C. §§ 183 *et seq*. Under § 183(a) the liability of the owner of any vessel may be limited to the amount specified in

the statute if the loss occurred without his privity or knowledge. 43a. Under § 185, the limitation proceeding is to be brought in a district court of the United States. 44a-45a.

Long before that part of § 185 was enacted this Court, in *Norwich Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871), pointed out that while the limitation act did not prescribe what court should be resorted to, no court was better adapted than a court of admiralty to administer such [limitation] relief, and went on to say:

> Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding.

Id. at 123-24. In thereafter describing the proper course for pleading a limitation action in the District Court so as to effectively bar other actions in state courts, the Court said:

> The Court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the District Courts, we have prepared some rules which will be announced at an early day.

Id. at 125. Those rules were duly issued as part of the admiralty rules and their current successor, Fed.R. Civ. P. Supplemental Admiralty Rule F, remains in effect. Since *Norwich* the courts have consistently held that limitation of liability proceedings are to be filed in the District Court, in admiralty.

The law of limited liability, as this Court has said, was enacted by Congress as part of the maritime law of this country, and therefore it is co-extensive, in its operation with the whole territorial domain of that law. *Butler v. Boston Steamship Co.*, 130 U.S. 527, 555 (1889). And, in *Executive Jet*, 409 U.S. at 270, this Court pointed out that the law of admiralty is concerned with, among other things, limitation of liability.

In *Richardson v. Harmon*, 222 U.S. 96 (1911), this Court held that a vessel owner was entitled to seek limitation of liability with respect to a non-maritime tort, by virtue of what is now 46 U.S.C. § 189. 46a. Accordingly, on the authority of *Richardson*, even if the claims against the ULTORIAN's owner are non-maritime torts, he is still entitled to seek limitation of liability, and the only court in which he may do so is the district court.

Sisson's reasoning, 17a-20a, concerning the changed circumstances due to the nexus requirement having later been added to the locality requirement is beside the point. *Richardson* plainly held that even though, but for the Limitation of Liability Act, there would have been no admiralty jurisdiction (the tort being non-maritime), the Act sufficed to put the case under district court jurisdiction in admiralty. The same principle is true today, even though the general test for admiralty and maritime jurisdiction has been modified.

In a sense, if there were no ordinary admiralty and maritime jurisdiction, the Limitation of Liability Act would be "legislation to the contrary" of the type referred to in *Executive Jet* quoted *supra* at 5, which would bring the case within such jurisdiction.[7] In any event, we respectfully submit that the vessel owner's right to seek to limit liability, an admiralty concern (*Executive Jet*, *supra*), combined with the traditional maritime activities here involved require the exercise of admiralty and maritime jurisdiction in this case.

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7 The same can be said of the Extension of Admiralty Act, 46 U.S.C. § 740 (Petition, 3-4).

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: July 12, 1989

Respectfully submitted,

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No. 88-2041

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OCTOBER TERM, 1988

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The Complaint of EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,

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BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF ON THE MERITS BY PETITIONER EVERETT A. SISSON

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QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. §1333 and Article III, Section 2, of the Constitution.

2. Whether the Limitation of Liability Act 46 U.S.C. §181 *et seq.* provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. §1333.

3. Whether this Court should reconsider its decision in *Richardson v. Harmon*, 222 U.S. 96 (1911).

LIST OF PARTIES

The parties to the proceedings below were Everett A. Sisson, owner of the motor yacht the M/V ULTORIAN and the Respondents Burton B. Ruby, Fireman's Fund Insurance Company, Port Authority of Michigan City, Continental Insurance Co., Cincinnati Insurance Co. and John P. Walther as claimants in the limitation proceeding. Marine Office of America Corporation and Roger Dillon were also claimants in the limitation proceeding, but were not parties to the proceedings before the United States Court of Appeals for the Seventh Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Statutes

No. 88-2041

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BRIEF ON THE MERITS BY PETITIONER EVERETT A. SISSON

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 867 F.2d 341 (7th Cir. 1989), and is reprinted in the Petitioner's Appendix to his Petition

for Certiorari at 1a, *infra.** The order of the Court of Appeals for the Seventh Circuit denying Petitioner's petition for rehearing is reported at *In Re Complaint of Sisson*, 1989 U.S. App. Lexis 4041 (7th Cir. 1989) and is reprinted in the Pet. App. 22a. The order of the United States District Court for the Northern District of Illinois is reported at 663 F. Supp. 858 (N.D. Ill. 1987), and the order denying the motion for reconsideration is reported at 668 F. Supp. 1196, (N.D. Ill. 1987) and are reprinted in the Pet. App. 25a and 37a respectively.

JURISDICTION

The Petitioner invoked federal jurisdiction under 28 U.S.C. §1333 in the United States District Court for the Northern District of Illinois Eastern Division. The Petitioner also based jurisdiction on the Limitation of Liability Act 46 U.S.C. §181 *et seq.* On July 1, 1987, the district court dismissed Petitioner's complaint for lack of subject matter jurisdiction which dismissal was affirmed on rehearing on September 25, 1987.

On Petitioner's appeal, the Seventh Circuit affirmed the district court on January 24, 1989, finding that there was no subject matter jurisdiction. On March 16, 1989, the Seventh Circuit Court of Appeals denied a Petition for Rehearing with suggestion for rehearing en banc. The Petitioners seek review of the decisions of the Seventh Circuit.

* The parties have agreed that the Appendix included in Petitioner's Brief for Certiorari will stand as the Joint Appendix.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. §1254(1). On January 22, 1990 this Court granted Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Of The Constitution

The judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction. . . .

STATUTES INVOLVED

28 U.S.C. §1333. ADMIRALTY, MARITIME and prize cases

The district court shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or Maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. §181 *et seq.* LIMITATION OF LIABILITY

See Pet. App. 42a.

STATEMENT OF THE CASE

Everett Sisson was the owner of a 56′ yacht known as the M/V ULTORIAN which was docked at Washington Park Marina in Michigan City, Indiana. The marina was located on Lake Michigan, a navigable waterway. On September 24, 1985, an unfriendly fire erupted on board the yacht, in the area of the washer/dryer unit, destroying the vessel and causing damage to the marina and several neighboring vessels. There has been no judicial determination as to the cause of the fire. There are three possibilities. One, the fire was caused by a defective washer/dryer unit on board the yacht, the negligent installation of the unit and/or the defective construction and installation of the ventilation system. Two, the Sissons had performed routine vessel maintenance and washed oily rags in the washer/dryer unit, and there may have been spontaneous combustion of the rags. Third, the fire may have resulted from some malfunction of the vessel's electrical system.

As a result of the fire, the Respondents (Claimants below) Burton B. Ruby, Fireman's Fund Insurance Company as subrogee of Burton B. Ruby, the Port Authority of Michigan City and other vessel owners asserted claims against Everett Sisson for amounts in excess of $275,000 for the damage to various vessels and the dock. The value of the M/V ULTORIAN before she was totally destroyed was approximately $600,000. Everett Sisson filed a Petition for Exoneration from or Limitation of Liability in the U.S. District Court for the Northern District of Illinois Eastern Division pursuant to 46 U.S.C. §183 *et seq.*

The District Court dismissed the limitation proceeding for lack of subject matter jurisdiction. The dismissal was affirmed on appeal by the United States Court of Appeals for the Seventh Circuit.

SUMMARY OF ARGUMENT

Everett Sisson believes that the lower courts erred in dismissing his Petition for Exoneration from or Limitation of Liability for lack of subject matter jurisdiction. The occurrence, a fire on a vessel docked on a navigable waterway, is clearly within the admiralty and maritime jurisdiction of the federal courts. Both the situs and nexus requirements of this Court's decisions in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982) are satisfied by the facts of this case.

The situs of the occurrence was a marina located on Lake Michigan, a navigable waterway.

The nexus test is satisfied because the M/V ULTORIAN was a vessel engaged in the activities of docking, mooring and navigation, which are traditional maritime activities, and because fire is a well known peril of the sea. This Court is urged to adopt the definition of a "vessel" as any craft or artificial contrivance used or capable of being used as a means of transportation on water. This definition, along with the requirement that the vessel be on a navigable waterway, should establish admiralty jurisdiction.

Petitioner believes that the lower courts interpreted this Court's earlier decisions too restrictively by finding that "traditional maritime activity" refers to only navigation. Traditional maritime activity should include more than just navigation. The Seventh Circuit also placed too much emphasis on commercial activity as the underpinning of the nexus test.

Finally, the Limitation of Liability Act should be available to pleasure craft as it applies to "all vessels." The Act also affords a statutory basis for jurisdiction separate and apart from the general maritime jurisdiction of the federal court. This Court's decision in *Richardson v. Harmon*, 222 U.S. 96 (1911) should be seen as supporting this interpretation of §189. There is no reason to reconsider *Richardson v. Harmon*, as the case properly interpreted an amendment to the Limitation of Liability Act, and has nothing to do with the Admiralty Extension Act.

ARGUMENT

I.

THERE IS SUBJECT MATTER JURISDICTION IN THIS CASE PURSUANT TO THE GENERAL GRANT OF ADMIRALTY AND MARITIME JURISDICTION IN ARTICLE III SECTION 2 OF THE CONSTITUTION AND 28 U.S.C. §1333.

A. Traditional Maritime Activities Are Not Limited To Situations Involving Commercial Activity And Navigation Through The Water.

The Seventh Circuit's decision involved the interpretation of the decision of this Court in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). In its interpretation of the *Foremost* case, the Seventh Circuit developed its own test to determine when the district courts had admiralty jurisdiction in tort cases. The court determined that admiralty jurisdiction would be available in "cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially 'disruptive impact' on maritime commerce and (2) involves the 'traditional maritime activity' of navigation." Pet. App. 8a. Because this case involved a non-commercial activity, the court determined that the two step analysis for non-commercial activities was necessary to determine jurisdiction.

The Seventh Circuit admittedly applied a narrow reading of the phrase "traditional maritime activity" which was the guidepost established by the *Foremost* Court. It limited such activity to cases involving navigation. Pet. App. 9a. The court justified this narrow reading by certain language found in the *Foremost* decision. The Seventh Circuit reasoned that because this Court emphasized that the "navigation" or "operation of a vessel" were "traditional maritime activities", wrongs arising out of those activities were required for a finding of jurisdiction. This reading limited traditional maritime activities to situations involving navigation through the water, and excluded any other activity which should be considered traditional maritime activity.

Alternatively, the court noted that even if "traditional maritime activity" was not confined to cases involving navigation, the court determined that the sort of fire on board the Sisson yacht should not be considered a "traditional concern" of maritime law. No court has ever tried to distinguish the type of fire as a test for jurisdiction.

The Petitioner believes that the test developed by the Seventh Circuit was excessively restrictive and does not

reflect the intent of the *Foremost* case in deciding jurisdiction on the basis of the presence of traditional maritime activities. The two pronged "test" does not represent a fair reading of *Foremost* for three reasons.[1]

First, the test developed by the court places an inordinate amount of emphasis on maritime commerce as a limiting factor to jurisdiction, but, the court never defined what it meant by "maritime commerce." The Seventh Circuit had previously used commercial activity as the determining factor for maritime jurisdiction issues before the decision in *Foremost*. *Chapman v. United States*, 575 F.2d 147, 1978 A.M.C. 2202 (7th Cir. 1978). This emphasis on maritime commerce was specifically repudiated by this Court in *Foremost* and cannot be the primary basis for any test to determine maritime jurisdiction. The court's decision, in effect, will move the law of admiralty jurisdiction backwards to the pre-*Executive Jet/Foremost* era.

Second, it is clear that the negligent navigation of a pleasure craft on navigable waterways is only one of many actions which have a significant connection with a traditional maritime activity; but it is not the sole, exclusive

[1] Even the concurring opinion recognized that the narrow reading of *Foremost* would place "inappropriate restrictions on admiralty jurisdiction in other instances". As noted by the opinion:

> "However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.
>
> Hopefully, before long, the Supreme Court will revisit this quagmire and resolve the current ambiguity generated by the courts of appeals in the wake of *Foremost*."

There was the recognition that other hazards are associated with maritime activities and these included fire. Still, the concurring opinion focused on "maritime commerce" as the primary basis for admiralty jurisdiction.

wrong. The test is whether the wrong has a significant connection with traditional maritime activity and not whether the wrong only involves the negligent navigation of a vessel.

Third, even if admiralty jurisdiction is limited to cases involving navigation, there is no legal or logical basis upon which to restrictively define "navigation" to the type involved in the *Foremost* case.

As for what constitutes "traditional maritime activity", navigation cannot be the only qualifying activity as such a reading would eliminate a whole range of other activities commonly associated with vessels such as fueling, repairs, maintenance, cargo operations, etc. Sailors paint, clean, wash, cook, work, rest and sleep on their vessels.

The "maritime commerce" element to the court's analysis is most peculiar for two reasons. First, the court, while it seemingly looked to determine what, if any, disruptive impact on maritime commerce had occurred, failed to define what it meant by maritime commerce. Second, if maritime commerce meant to refer to the commercial, profit-making enterprises associated with maritime law, is not the operation of a marina a commercial activity? Vessels pay dockage, buy fuel and provisions, obtain insurance, pay salaries, repair boats and pay taxes. These goods and services move, as do the boats themselves, in interstate commerce. Here, the claimants' dock and boat were damaged. The dock was located along a commercial channel. Did not the fire have a potential impact upon maritime commerce? The court seems to have overlooked all of these aspects.

THE ULTORIAN was tied up at a dock on a navigable waterway, Lake Michigan, at the time of the fire. The mooring or docking of a vessel is a traditional maritime

activity. Docks serve the various needs of vessels and have done so for centuries. During the course of a sailing season, vessels, such as the ULTORIAN, are customarily moored or docked at marina facilities when they are not actually in use. Typically, a contract between the vessel owner and the marina owner governs the docking or mooring, and these contracts are subject to admiralty jurisdiction. *American Eastern Development Corp. v. Everglades Marina, Inc.*, 608 F.2d 123, 1980 A.M.C. 2011, 2012 (5th Cir. 1979); *English Whipple Sail Yard Ltd. v. The Yawl Ardent*, 459 F. Supp. 866, 1980 A.M.C. 1104 (W.D. Pa. 1978). Also, as vessels are not always moving, from time to time they need to be moored or docked for repair, rest, convenience, replenishment, maintenance, weather and landing of goods and people. All of these functions are part of the marine activities of a vessel. This does not mean that they have been withdrawn from maritime navigation or activity. They are simply in a floating position from which they can be quickly started and taken out to sea. Mooring and docking as traditional maritime activities are clearly evident in the multitude of admiralty cases which involve such activities. Some recent examples of these are found in *Weyerhaeuser Company v. ATROPAS Island*, 777 F.2d 1344 (9th Cir. 1985); (vessel liable for damages to dock when it dragged anchor and hit dock); *Hardesty v. Larchmont Yacht*, 1983 A.M.C. 1059 (S.D.N.Y. 1982) (damages to yacht which broke free from a mooring).

However, even if the Seventh Circuit was correct in interpreting this Court's decision in *Foremost*, it failed to define what is meant by "navigation". Ironically, relying on "navigation" as the defining element also creates definitional problems, as the panel recognized. Pet. App. 13a n.7. This restricted view will not limit jurisdictional issues,

but will only cause future confusion and destroy the uniform application of maritime law.

However, even if navigation is the only traditional maritime activity which could trigger the maritime jurisdiction of this Court, the ULTORIAN was in navigation at the time of the fire. To find otherwise would be a restricted and unwarranted interpretation of the meaning of "navigation" as demonstrated by the Fifth Circuit Court of Appeals in *American Eastern*, supra.

American Eastern involved two pleasure craft which had been damaged in a fire at a marina. The boats were fully operational and were lifted in and out of the water on a weekly basis by a forklift. The court noted that the purpose of the storage was to obviate storage in salt water with the attendant cost of maintenance (including keeping the boats barnacle free).

With regard to the issue of whether a claim against the marina could be plead in admiralty, the Fifth Circuit stated as follows:

> The boats were not withdrawn from navigation. This case is more analogous to those involving docking or wharfage to those where boats are stored for the winter or laid up for long periods. In recent years, many pleasure boaters who frequently take their boats in and out of the water, as appellees here did, have come to regard dry storage at waterside marinas, from which the boats may be readily taken in and out, as an alternative to tying their boats up at docks or moorings. The boat is readily accessible to the water and can be quickly and easily launched or brought ashore to the storage shed but it is not exposed to deteriorating effects of water or weather. Moreover, in determining whether a vessel has been withdrawn from navigation, one must look at its pattern of use. Pleasure boats are often tied up a higher

> proportion of the time than commercial vessels which typically may spend little time in port. Here, the boats in question were used no less than necessary or appropriate for pleasure craft, and the dry storage, incident to regular use, was a substitute for wet mooring or docking. Admiralty jurisdiction has, in the past, changed as "new conditions give new rise to new conceptions and maritime concerns." (Citations omitted.)

608 F.2d at 124-25.[2]

The Fifth Circuit, therefore, concluded that the fact that the boats were taken in and out of the water almost on a weekly basis did not mean that they were withdrawn from navigation and thus, the claims fell within the admiralty jurisdiction of the Court. *Id.* at 125.[3] The term "navigation" is not restricted solely to a vessel moving in the water. It is the whole panoply of functions a vessel performs in the water.

Clearly the facts in this case are even stronger than in *American Eastern*, because the ULTORIAN was not beached or lifted in and out of the water on a regular basis but was moored in a navigable waterway at a dock in a marina. It was not withdrawn from navigation and was thus involved in a traditional maritime activity at the

[2] Both the District Court and the Court of Appeals distinguished *American Eastern* by reading it as a contract case. However, it is cited for the proposition that navigation is not limited to movement in the water but may also include the period of docking or mooring.

[3] Ironically, the *Foremost* case also originated in the Fifth Circuit and this Court affirmed the decision of the Court of Appeals regarding the correct interpretation of the standard needed to support admiralty jurisdiction.

time of the fire. The fire also caused damage to the marina's dock and other vessels in the water all of which were engaged in a traditional maritime activity.

Finally, if navigation is the only activity to support a finding of jurisdiction, the fire here obviously disrupted the movement (navigation) of boats within the navigable waters of the marina. It also was a potentially disruptive event to the nearby commercial channel, and the Coast Guard's nearby rescue station.

The Seventh Circuit's opinion also ignores the universal recognition of fire as a classic marine peril. Indeed, according to the Fifth Circuit, in a case involving a fire aboard a docked freighter,

> A non-friendly fire [as opposed to a galley stove fire] aboard ship so long as it remains unextinguished is a classic case of marine peril. With flammable materials almost everywhere, passages and spaces where natural convection readily permits a small smoldering to break out in a blazing fury, the history of the sea attests to fire as a cause of some of the most catastrophic of marine disasters. See, the *Morro Castle and Texas City Disasters.*

Legnos v. M/V Olga Jacob, 498 F.2d 666, 670 (5th Cir. 1974) (citing *United States v. Abbott*, 89 F.2d 166 (2d Cir. 1937)); *Hyman v. Pottberg's Ex'rs.*, 101 F.2d 262 (2d Cir. 1939); *Petition of Agwi Navigation and New York & Cuba Mail S.S.*, 1939 A.M.C. 895 (S.D.N.Y. 1939); *New York & Cuba Mail S.S. Co. v. Continental Insurance Co.*, 32 F.Supp. 251 (S.D.N.Y. 1940) (fire abroad passenger vessel cause death of over one hundred persons); *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir., 1952), *aff'd sub nom., Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (approximately 560 persons killed and much of Texas City destroyed by fires

and explosions originating from cargoes of fertilizer on two vessels in Texas City Harbor); *Republic of France v. United States*, 290 F.2d 395 (5th Cir. 1961). In this case, there can be no doubt that the destruction of almost one million dollars of property and the potential threat to lives was the result of an unfriendly fire, a recognized marine peril.

There can be little doubt that fire on a vessel is regarded as one of the three greatest dangers at sea. See, *Southport Fisheries, Inc. v. Saskatchewan Government Ins. Office*, 161 F.Supp. 81, 83-4 (D.C.N.C. 1958).[4] Regulations promulgated by the United States Coast Guard promote and enforce fire safety on vessels. (See 46 C.F.R. §§ 72.03, 72.05, 72.15, 72.20 and § 76, generally.) Also, the Safety of Life At Sea Convention ("SOLAS") 32 U.S.T. 47 has promulgated fire safety regulations utilized in evidence in federal maritime tort cases. *Meyers v. The M/V Eugenio C.*, 876 F.2d 38, 39 (5th Cir. 1989). The Secretary of Transportation is also authorized to prescribe regulations for firefighting equipment on board recreational vessels. 46 U.S.C. § 4302.

B. The Grant of Admiralty and Maritime Jurisdiction to Federal Courts Should Be Broadly Construed.

Since the early days of this nation, the grant of admiralty and maritime jurisdiction to this Court in the Constitution has been broadly construed by the courts.

The first exposition of admiralty tort jurisdiction was expressed by Justice Story while he was Circuit Justice

[4] The court described fire as a risk which was more likely to result in a loss to those engaged in maritime activity. The other two risks are foundering and piracy.

for the District of Massachusetts. *DeLovio v. Boit*, 7 *Fed. Cas.* 418 (C.C.D. Mass. 1815). In *DeLovio* Judge Story stated that jurisdiction over torts depended ". . . upon locality, *i.e.*, whether done upon the high sea, or in ports within the ebb and flow of the tide, or not." Judge Story also noted that the grant of the Constitution was broader than just "admiralty" under English law:

> The clause however of the Constitution not only confers admiralty jurisdiction, but the word "maritime" is super added, seemingly ex industria, to remove every latent doubt. "Cases of maritime jurisdiction" must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admiralty, "causae civiles et maritime." In this view there is a peculiar propriety in the incorporation of the term "maritime" into the Constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. [Citation omitted]. One party sought to limit it by locality, another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all "cases of maritime jurisdiction," or, what is precisely equivalent, of all maritime cases. . . . [T]he language of the Constitution will therefore warrant the most liberal interpretation. . . .
>
> At all events, there is no solid reason for construing the terms of the Constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions that common law founded on those statutes, ... The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe the national policy, as well as juridical logic, require the clause of the Constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which

originally and inherently belonged to the admiralty, before any statutable restriction.

Id. at 442-43.

There has been no development since Justice Story wrote those words which would suggest that the jurisdiction of this Court should now be restricted. Indeed, this Court's decision in *Foremost* appears to be a direct repudiation of a restrictive interpretation of the admiralty and maritime jurisdiction. The Seventh Circuit's decision, however, would restrict this grant of jurisdiction contrary to its historical development, which also has contributed to the development of a uniform body of law.

A rule which would distinguish between fires according to whether the vessel is docked or physically "in navigation" when the fire arises, or between whether the source of ignition is maritime or non-maritime, would destroy the uniformity which is the object of the admiralty jurisdiction and ignores the marine perils shared by pleasure and commercial vessels.

For instance, if a passenger carrying excursion vessel located at the same marina caught fire and caused the same damage would there be maritime jurisdiction simply because the vessel was arguably a commercial vessel even if there was no impact on navigation? If the answer is yes, what is the difference in the substantive impact between such a fire and the fire on board the ULTORIAN? If the fire on the passenger carrying vessel began in the dryer on board, would this be sufficient for jurisdiction simply because the dryer was on board a commercial vessel? If there is truly a basis for making these distinctions solely on the basis of the function of the vessel (pleasure or commercial) then no activity or fire involving a pleasure craft can ever trigger admiralty jurisdiction.

There are other conceivably conflicting results created by the Seventh Circuit's approach. If Everett Sisson had hired an employee to man the M/V ULTORIAN and that employee was injured as a result of the fire, he would be entitled to make a claim for injuries in admiralty as a Jones Act seaman. 46 U.S.C. §688; *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986); *Offshore Oil Co. v. Robinson*, 266 F.2d 769 (5th Cir. 1959); *Gorgas v. Williams*, 1976 A.M.C. 2387, 2396 (D.N.J.); *Petition of Read*, 224 F.Supp. 241, 244-46 (S.D. Fla. 1963). Mr. Sisson would also owe a continuing, absolute and nondelegable duty to his crew member to provide a seaworthy vessel. *Petition of Read*, supra at 248-49, 251. The injured crew member would also be entitled to maintenance and cure. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 530, 58 S.Ct. 651, 654 (1938). Yet, presumably, Mr. Sisson would not be in a position to limit his liability because the vessel was not in commerce nor in navigation.

Everett Sisson would find himself in the same position if a social guest were on board at the time of the fire and the guest injured as a result of the fire. This Court has held that the owner of a pleasure craft owes a duty to use due care toward non crew members lawfully on board the vessel and that such a claim would fall under the general maritime law based in negligence. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31, 79 S. Ct. 406, 409-10 (1959). In *Kermarec*, the plaintiff was injured while he was visiting a member of the ship's crew as a result of a fall down a stairway. The plaintiff's action was brought alleging unseaworthiness and negligence. This Court refused to draw the common law distinction between licensee and invitee and simply held that "the owner of a ship in navigable waters owes to all who are on board for purposes not inimicable to his

legitimate interest the duty of exercising reasonable care under the circumstances of each case." *Id* at 632. Those principles have been applied to pleasure craft cases by both federal and state courts. *Gele v. Chevron Oil Co.*, 574 F.2d 243, 248 (5th Cir. 1978); *Gibboney v. Wright*, 517 F.2d 1054, 1059 (5th Cir. 1975); *Urian v. Milstead*, 473 F.2d 948, 949-50 (8th Cir. 1973); *Branch v. Schumann*, 445 F.2d 175, 179 (5th Cir. 1971); *Armour v. Gradler*, 448 F. Supp. 741, 744, 747-48 (W.D. Pa. 1978); *Roper v. Stafford*, 444 A.2d 289 (Del. Super. 1982) (holding that federal maritime law, including the Federal Boat Safety Act of 1971, governed an action against a motor boat operator); *Zukowsky v. Brown*, 79 Wash. 2d 586, 488 P.2d 269 (1971) (applying the principles of *Kermarec*); *Cashell v. Hart*, 143 So.2d 559 (Fla. Dist. App. 1962) (applying the principles of *Kermarec*).

What if Mr. Sisson had a passenger for hire on board to be carried across the Lake to Milwaukee the next morning? What if a guest paid for fuel? Does the result change under Sisson? Should it? What about pleasure craft the size of Mr. Trump's yacht or Mr. Forbes' yacht?

Based upon this Court's decision in *Kermarec*, Everett Sisson would face liability for the injuries sustained by his social guests in accordance with the rules governing negligence in general maritime law and, yet, would not be able to limit his liability because the fire, the condition which gave rise to it and the activity at the time would be outside the scope of maritime jurisdiction based on the Seventh Circuit's opinion. He could also face penalties under the Federal Boat Safety Act of 1971, 46 U.S.C §2301 if it is later determined that the fire onboard the M/V ULTORIAN was caused by the negligent manner in which Mr. Sisson was operating the ULTORIAN. He would then face penalties under federal law with no right to limitation.

The uniformity objective of admiralty jurisdiction is an important concept and has its roots in Article III, Section 2 of the Constitution in which the federal judiciary was given admiralty and maritime jurisdiction. This has been interpreted by this Court to encompass three different grants of power:

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I, §8, cl.9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," [citation omitted], and to continue the development of this law within Constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the Constitution.

Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61, *reh. den.*, 359 U.S. 962 (1959).

It is important to maintain the uniformity of admiralty law in order to conform to the Constitutional protection afforded it. The only way this uniformity can be maintained is through the federal judiciary which has historically interpreted and applied federal maritime law and sought to preserve the uniformity. The Seventh Circuit's decision threatens that uniformity by removing from federal jurisdiction, a whole class of cases based on an unjustifiably narrow reading of this Court's opinions.

C. The Seventh Circuit's Decision Is In Conflict With Other Circuits.

The test developed by the Seventh Circuit is also in sharp contrast with the law in other circuits which generally follow the 5th Circuit test. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); *Drake*

v. Raymark Industry, 772 F.2d 1007, 1986 A.M.C. 1965 (1st Cir. 1985), *cert. denied*, 106 S.Ct. 1974 (1986); *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 1985 A.M.C. 2317 (4th Cir.) *en banc, cert. denied*, 474 U.S. 970 (1985); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 1986 A.M.C. 731 (11th Cir. 1984); *Edynak v. Atlantic Shipping, Inc.*, 562 F.2d 215, 1977 A.M.C. 2477 (3d Cir. 1977); *T.J. Falgout Boats, Inc. v. U.S.*, 508 F.2d 855 (9th Cir. 1974); *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), *cert. denied*, 419 U.S. 884 (1974).

The Fifth Circuit Court of Appeals noted the factors which are used to determine whether an alleged wrong bears a sufficient nexus to a traditional maritime activity. Those factors are: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and, (4) the traditional concepts of the role of admiralty law. *Kelly*, 485 F.2d at 525. This test was developed before this Court's decisions in *Executive Jet* and *Foremost*, but most circuits have looked to the test to make the nexus determination.

Recently, the Fifth Circuit added additional criteria to consider in making such a decision which it gleaned from this Court's decisions. *Molett v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987). There it looked to: (1) the impact of the event in maritime shipping and commerce; (2) the desirability of a uniform national rule; and, (3) the need for admiralty expertise in the trial and decision.

Petitioner recognizes that there are problems with the *Kelly* test factors which do not render an easy solution in all cases. Yet, all other tests clearly show that flexibility is called for beyond that mandated by the Seventh Circuit's almost exclusive reliance on the element of commerce.

As an example of the flexibility, the test of *Kelly/Molett* would confer admiralty jurisdiction here. The Petitioner was a boat owner and the Claimant-Respondents were boat owners at a marina. The vehicles involved were vessels and a vessel dock. The type of injury was the destruction of vessels at a dock. Docking and mooring are traditional maritime activities. The fire and sinking had a potential impact on navigation in the harbor and channel. National rules already apply to the M/V ULTORIAN, and admiralty expertise will be needed to apply the rules to this case.

Applying the two-part test of *Smith v. Knowles*, 642 F. Supp. 1137 (D.Md. 1986), would also result in jurisdiction. Then you would have the traditional activities of mooring and docking as well as the installation of the washer/dryer unit in a vessel. A vessel is distinctly maritime in nature. The second part of the test is also satisfied here, because the fire spread to other vessels at other docks causing damage that could clearly have hindered the navigation of any other vessels within the harbor. The fire could have spread throughout the marina, into a nearby channel and to the Coast Guard rescue station which would then have hindered navigation of other vessels.

Also, the instrumentalities, the claimants and the peril involved in the instant case all satisfy the requisites set by this Court. The seaworthiness of the M/V ULTORIAN may also be questioned and that must be tested by uniform federal standards. Limitation is a concept peculiar to admiralty law. *Executive Jet* 409 U.S. at 270.

Most recently, the Court of Appeals for the Sixth Circuit, in deciding that the Limitation of Liability Act applied to pleasure craft noted the concurrence by Judge Ripple where he even criticized the Seventh Circuit's "in-

defensibly narrow reading of *Foremost Insurance.*" *In re Young*, 872 F.2d 176, 178 (6th Cir. 1989) (Personal injuries resulting from explosion on board a pleasure craft while operated on Lake Erie.).

While the test formulated by the Fifth Circuit is more satisfying it still has two inherent defects. First, commerce is an element which is still considered. Second, it fails to focus on the obvious. A vessel can only engage in the activities for which it is designed, all of which are maritime in nature. Vessels are not built to house or transport people on land. They are built to transport people and cargo on the water for a multitude of purposes, both for hire and pleasure. A craft attains the status of a vessel when it has been completed, launched, fitted out and is ready to function. See *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242, 41 S.Ct. 65 (1920). In performing that essential function, vessels navigate through the water, moor and dock, are repaired and maintained, carry machinery and appliances, employ crewmen and take out insurance. Once an instrumentality has been defined as a vessel, it can only be considered engaged in maritime activity. Otherwise, it would not be a vessel at all. Once permanently removed from navigation, it loses its status. *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 46 S.Ct. 379 (1926).

Petitioner takes the position that the decision in *Foremost* precludes any test which restricts admiralty jurisdiction to the commercial activity or navigation through the water. The determination of admiralty jurisdiction must be expansive and not restrictive as to do otherwise would destroy traditional notions of admiralty jurisdiction and uniformity on the nation's waterways.

D. Test For Admiralty Jurisdiction.

It is suggested that a test that would cover both the interest in *DeLovio v. Boit*, for an expansive application of the constitutional grant of admiralty and maritime jurisdiction and the nexus requirement of *Executive Jet* would be in the best interests of admiralty and maritime law as it would provide the required uniformity and predictability. Both interests could be satisfied if the tort occurred during an activity on a navigable waterway and involved "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.

If the tort occurred on navigable water and involved a vessel, there would be maritime jurisdiction. All other torts, unless otherwise statutorily included, would be excluded from maritime jurisdiction.

If the "watercraft" or "contrivance" were used or capable of being used as a means of transportation on water, the nexus test would be satisfied. First, by definition, only those torts involving vessels would be included in jurisdiction. Second, the definition of "vessel" is broad enough to include all manner of craft such as barges, tugs, freighters, rowboats, ferry boats, excursion boats, fishing boats and certainly the *M/V Ultorian*. Third, the definition limits jurisdiction to craft which are used or capable of being used in a traditional maritime activity, i.e. transportation on the water. This would include the transportation of property and people (recreational or commerce). Fourth, this formulation would eliminate craft which have never been in navigation or which have been permanently withdrawn from navigation. Fifth, application of the nexus test would be greatly simplified as the focus would be on the vessel or contrivance involved. The

courts would no longer have to split hairs over what is or is not traditional maritime activity or whether the activity had a potential impact on commerce. Sixth, this formulation is flexible enough to expand as maritime technology changes and evolves. Seventh, it would lead to uniformity in law applicable to vessel casualties on navigable waters. It would be consistent with all federal laws which define and regulate vessels, and this Court's previous rulings, bringing all vessels traveling on navigable waterways into the universe of the admiralty. Finally, proper state interests would still be protected as the definition would include the situs requirement.

It is suggested that this objective test would produce more uniformity on navigable waterways than the multipart subjective test that would only create more confusion.

II.

THE LIMITATION OF LIABILITY ACT 46 U.S.C §181 *ET SEQ.* PROVIDES A SOURCE OF ADMIRALTY JURISDICTION SEPARATE AND APART FROM JURISDICTION UNDER 28 U.S.C. §1333.

A. The Limitation Act Applies To All Vessels.

1. The Legislative History Supports The Proposition That Congress Intended The Limitation Act To Cover Pleasure Craft.

The section of the Limitation Act which is directly at issue here is 46 U.S.C. §183(a) which reads as follows:

> Liability of the owner of *any vessel*, whether American or foreign, for any embezzlement, loss, or destruction by any person or any property, goods or merchandise shipped or put on board of such vessel or for any loss, damage or injury by collision or for any fact, matter, or thing, loss, damage or forfeiture,

> done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. (Emphasis added.)

The history of the Limitation Act and specifically §183 clearly demonstrates that Congress intended for pleasure craft to be included in the generic category of "vessel".

The original Limitation Act was enacted in 1851 and its stated purpose was, as one commentator has noted, "to place the American merchant marine and shipbuilding industry on equal footing with those of the old maritime nations of Europe". *Herman*, "Limitation of Liability for Pleasure Craft" Journal of Maritime Law and Commerce, Volume 14, Number 3, July, 1983 at 419. Today, many pleasure craft are built overseas in direct competition with domestic builders. Subsequent to the enactment of the statute, there was much debate as to whether pleasure craft were intended to be included. This issue was seemingly put to rest by the decision in *The Mamie*, 5 F. 813 (D.C. Mich. 1881), *aff'd.*, 8 F. 367 (C.C.E.D. Mich. 1881) where a federal district court held that the Limitation Act was restricted to vessels of a commercial nature.[5]

Following the decision in *The Mamie*, Congress amended the Limitation Act to extend its application to "*all seagoing vessels*, and also to *all vessels* used on lakes or rivers or in inland navigation, including canal boats, barges and lighters." Active June 19, 1886, Chapter 421 §4, 24

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[5] A good, concise history of the Limitation Act may be found in *In re Porter*, 272 F.Supp. 282, 283-284 (S.D. Tex. 1967). See also Bartlett, *When is a Boat Not a Vessel? Recreational Boats Navigate Through the Jurisdiction and Limitation Quagmire*, 1989, ABA Tort and Insurance Practice Section Tips on the Law of Small Boating.

Stat. 80 as amended 46 U.S.C. §188 (1970). Congress subsequently amended the Limitation Act in 1935, 1936 and 1984. The 1936 amendment to the Act covered §183(b)-(e) and the term "seagoing vessels" was defined to exclude "pleasure yachts", but only for the purposes of §183(b)-(e) which have to do with the per ton dollar limitation for bodily injury. The term "vessel" in §183(a) was not restricted.[6] The 1984 Amendment to §183(b) did not restrict the definition of the term "vessel" in any way. As amended October 19, 1984 Pub.L. 98-498 Title II, §213(a), 98 Stat. 2306. Most courts have recognized that by excluding "pleasure yachts" from the $60 per ton requirement, Congress showed its intent in having such vessels included in the remaining provisions of the Act. *In re Complaint of Brown*, 536 F.Supp. 750, 751 (N.D. Ohio 1982); *Petition of Klarman*, 295 F.Supp. 1021, 1022, (D. Conn. 1968); *In re Porter*, supra at 284 (S.D. Tex. 1967).

Some courts have determined that Congress did not intend to signal that a pleasure craft was a vessel for the purpose of §183(a) when it amended the Act in 1936. *In re Lowing*, 635 F.Supp. 520, 524 (W.D. Mich. 1986). However, this is an incorrect conclusion and contrary to the rules governing how courts may interpret legislative intent because it ignores the Act as a whole which clearly makes yachts "vessels" for purposes of §183.

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[6] 46 U.S.C. §183(f) provides:

> As used in subsections (b), (c), (d), and (e) of this section and in §183(b) of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in §188 of this title.

Finally, §188 of the Act (entitled "Limitation of Liability of Owners Applied to All Vessels") unequivocally states that §183 "shall apply to all seagoing vessels, and also to all vessels." This draws the same distinction between "seagoing vessels" and "vessels" as is found in §183(a) and §§183(b)-(e). As one court insightfully noted,

> Since, if a pleasure yacht were not a vessel, and hence excluded from the operations of §183(a), it would be unnecessary to exclude it from §183(b)-(e), it is obvious that a pleasure yacht is a vessel for the purposes of §183(a). *Complaint of Brown*, supra at 751.[7]

The plain statutory language in the Limitation Act should be followed. *United States v. Monsanto*, 109 S.Ct. 2657, 2662-63 (1989); *Immigration & Naturalization Service v. Cardoza-Fonsera*, 480 U.S. 421 (1987). "All vessels" means all vessels.

2. The Majority of Courts Have Applied The Limitation Act To Pleasure Craft.

Not only has Congress manifested its intention to cover pleasure craft within the Limitation Act, but the vast majority of courts have also found that the Limitation Act covers pleasure craft.

The decision by Congress to amend the Limitation Act in 1886 in the wake of the restrictive interpretation found in *The Mamie* was not lost on the federal district court in *The Alola*, 228 F. 1006 (D.C. Va. 1915). There a petition for limitation filed by the owner of a forty-five foot

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[7] Gilmore & Black, in their noted treatise also conclude that vessels excluded from §183(b) are entitled to the protection of the other provisions of the Limitation Act. Gilmore & Black, *The Law of Admiralty*, 2d Ed. p. 836.

gasoline motor boat was granted by the court. This was followed by *In Re Foss (THE LUVINA)*, 1927 A.M.C. 327 (S.D.N.Y. 1927) in which the district court determined that Congress had demonstrated its intent of extending limitation of liability to noncommercial vessels engaged in pleasure pursuit and affirmed the right of an owner of a pleasure craft to take advantage of the Limitation Act. The Second Circuit in *The Oneida*, 282 F.288 (2d Cir. 1922), and recently in *In the Matter of Michael Guglielmo*, 1990 U.S. App. LEXIS 2881 (2d Cir. 1990); the Fourth Circuit in *Richards v. Blake Builders Supply*, 528 F.2d 745 (4th Cir. 1975); the Fifth Circuit in *Warnken v. Moody*, 22 F.2d 960 (5th Cir. 1927) and *Gibboney v. Wright* 517 F.2d 1054 (5th Cir. 1975); the Sixth Circuit in *Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937) and *In Re Young*, supra; the Eighth Circuit in *St. Hilaire Moys v. Henderson*, 495 F.2d 978 (8th Cir.), *cert. denied*, 419 U.S. 884, 95 S.Ct. 151 (1974); and, the Ninth Circuit in *Hechinger v. Caskie*, 890 F.2d 202 (9th Cir. 1989) have held that the term "vessel" as used in the Act included pleasure craft. Most recently, the Eleventh Circuit in a well reasoned decision, ruled that a jet ski boat was a vessel and entitled to limitation under the Act. *Keys Jet Ski, Inc. v Kays* 1990 U.S. App. LEXIS 1380 (11th Cir. 1990)

This Court has also had the opportunity to review this issue on at least three occasions. *Coryell v. Phipps*, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943); *Just v. Chambers*, 312 U.S. 668, 61 S.Ct. 687, L.Ed. 903 (1941); and *The Linseed King*, 285 U.S. 502, (1932). Each case involved the Limitation Act and in each case there was no discussion or question regarding its application to pleasure craft.

Since the early cases cited above, most other courts have also found that the Limitation Act is applicable to

pleasure craft. *In re Complaint of Brown*, 536 F.Supp. 750 (N.D. Ohio 1982); *Armour v. Gradler*, 448 F.Supp. 741 (W.D. Pa. 1978); *Application of Theisen*, 349 F.Supp. 737 (E.D.N.Y. 1972); *Petition of Klarman*, 295 F.Supp. 1021 (D. Conn. 1968); *In re Porter*, supra at 282 (S.D. Tex. 1967); *Kaiser v. Traveler's Ins. Co.*, 359 F.Supp. 90 (E.D. La. 1973), *aff'd.*, 487 F.2d 1300 (5th Cir. 1979); *Petition of Colonial Trust Co.*, 124 F.Supp. 73 (D. Conn. 1954); *In re Liebler* 19 F.Supp. 829, 832 (W.D.N.Y. 1937).

While some courts have questioned the result, they have chosen to follow the intent of Congress and well established case law. *In re Porter*, supra at 285-86. The Eleventh Circuit in reviewing *In re Young*, supra agreed with the Sixth Circuit when it said: "If, indeed, anything is broken, it's up to Congress to fix it." *In re Young*, supra at 178. Other cases which hold to the contrary are clearly the minority view.

3. Other Statutes.

If there is any doubt as to what Congress intended by the term "vessel" in §183(a), one need only look at other statutes dealing with maritime activity in which the term "vessel" is used in order to show that "vessel" includes pleasure craft.

1 U.S.C. § 3 entitled "Rules of Construction" provides as follows:

> *"Vessel" as including all means of water transportation*
>
> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

It is clear from this section that Congress intended the word "vessel" or the words "all vessels" to be construed

in its broadest sense. *McCarthy v. The Bark Peking*, 716 F.2d 130 (2d Cir. 1983); *Trinidad Corp. v. American S. S. Owners Mutual Protection & Indem. Association*, 229 F.2d 57 (2d Cir. 1956), *cert. denied*, 351 U.S. 966, 76 S.Ct. 1032 (1956). Courts have followed this dictate and found house boats and yachts to be "vessels." *Miami River Boat Yard, Inc. v. 60' Houseboat etc.*, 390 F.2d 596 (5th Cir. 1968); *The Ark*, 17 F.2d 446 (S.D. Fla. 1926); *Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F.Supp. 987 (S.D.N.Y. 1979); *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, etc.*, 625 F.2d 44 (5th Cir. 1980); *U.S. v. Holmes*, 104 F. 884 (C.C. Ohio 1900); *The International*, 32 C.C.A. 258, 89 F. 484 (C.C.A. Pa. 1898). Even a jet ski which is being used as a means of transportation on water is a "vessel" within this definition. *Key Jet Ski, Inc.*, supra at 1526.

The same definition of vessel was transferred *verbatim* to 46 U.S.C. §2101(45) ("Shipping") which was enacted in 1984.

In 1971, Congress enacted the "Coordinated National Boating Safety Program" codified in 33 U.S.C. §§1451 *et seq.* While that Act has been repealed, the way in which Congress defined certain terms is illustrative. Section 1452(2) defined "vessel" as:

> every description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on the water.

The similarity between this definition and the one found in 1 U.S.C. §3 is striking and is again illustrative of what Congress intends by the term "vessel."

Finally, 33 U.S.C. §2003 (a) entitled "Inland Navigational Rules" administered by the United States Coast Guard defines "vessel" as "every description of water-

craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water."

Congress has clearly expressed its intent as to how it defines the word "vessel" in at least three separate statutes enacted over a long period of time. If this history is not persuasive enough, this Court need only rely on the first rule of statutory interpretation which is that words in statutes should be given their ordinary common meaning unless there is persuasive reason to the contrary. *International Admrs., Inc. v. Life Ins. Co. of N.A.*, 753 F.2d 1373 (7th Cir. 1985).

For this ordinary common meaning we can look to Webster's Dictionary which defines "vessel" as

> "A craft for traveling on water; a ship or boat, especially one larger than a rowboat." *Webster's New Universal Unabridged Dictionary*, 2nd Ed.

The Ultorian fits this definition as well as the statutory definitions outlined above.

4. The Minority View.

The few courts that have recently held that the Limitation Act does not cover pleasure craft are clearly in a minority. They have ignored the clear meaning of the term "vessel" in §183(a). They have sought to downplay the actions of Congress in its amendatory dealings with the Act. Furthermore, they have chosen to further ignore the definition of "vessel" contained in other statutes dealing with maritime matters. These Courts have ignored the common definition of the word "vessel" even though the first rule of statutory interpretation demands it. In closing their eyes to all of this, they have also failed to construe legislation so that it effectuates legislative in-

tent. *In Re Arnett*, 731 F.2d 358 (6th Cir. 1984); *United States v. Smith*, 209 F.Supp. 907 (E.D. Ill. 1962).

It is clear that these courts which have chosen to ignore Congressional intent and the overwhelming case precedent in favor of applying the Limitation Act to pleasure craft do so because they believe that the policy of allowing pleasure craft owners to limit liability is incorrect. However, it is for Congress to decide this issue. *Keys Jet Ski, Inc.*, supra at 1526.

5. Uniformity Requires That Pleasure Vessels Be Given The Benefit Of Limitation Of Liability.

Allowing limitation to a commercial vessel and not to a pleasure craft would be contrary to this Court's decision in *Foremost*, which removed the distinction between pleasure craft and commercial vessels. There is no sound reason for distinguishing between vessels which ply the same navigable waters and operate under the same regime of maritime rules and regulations.

6. Summary.

There is overwhelming support for application of the Limitation Act to the instant situation. The plain common meaning of the word "vessel" in §183(a) includes pleasure craft. Congress has amended the Act several times over time and has always made it clear that pleasure craft are covered by §183(a). Congress has also defined "vessel" in other analogous statutes to include pleasure craft. The vast majority of courts have applied the Act to cover pleasure craft. There can be no question that "vessel" includes pleasure craft except in the minds of those who would rewrite statutes contrary to their legislative intent and plain meaning of the words.

B. The Limitation Of Liability Act Provides A Separate Basis For Jurisdiction.

1. The Act is Not Tied to The Nexus Requirement.

The Seventh Circuit, while acknowledging that the scope of limitation of liability was extended by §189 to include non-maritime torts, seems to have confused certain fundamental concepts.

First, limitation of liability is a statutory creation first established in 1851. *Norwich Co. v. Wright*, 80 U.S. 104, 20 L.Ed. 585 (1872); *The Hamilton*, 207 U.S. 398, (1907). This Court has recognized that the statutory grant of jurisdiction must be broadly applied.

> "But this limitation of liability proceeding differs from the ordinary admiralty suit, in that by reason of the statute and rules, the court of admiralty has power (*Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 27 L.Ed. 1038, 3 S.Ct. Rep. 379, 617) to do what is exceptional in a court of admiralty — to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court (Benedict, *Admiralty*, 5th ed. §70, note 97)".

Hartford Accident & Indemnity Co. v. Southern Pacific, 273 U.S. 206, 218; 45 S.Ct. 357, 360 (1926).

"The limitation extends to tort claims even where the tort is non-maritime." *Just*, supra at 383.

> "In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle (*Andrews v. Wall*, 3 How, 568, 573, 11 L.Ed.

729, 731; *THE J.E. RUMBELL*, 148 U.S. 1, 15; 37, 13 S.Ct. 498; L.Ed. 345, 348; Admiralty Rule 43; *THE GALAM*, 2 Moore P.C.C.N.S. 216, 236), but is the result of the statute which provides for, as well as limits, the liability, and allows it to be proved against the fund (*THE ALBERT DUMOIS*, 177 U.S. 240, 260; 20 S.Ct. 595, 44 L.Ed. 751, 762. See *Workman v. New York*, 179 U.S. 552, 563, 21 S.Ct. 21, 245 L.Ed. 314, 321).

THE HAMILTON, supra at 406.[8]

Second, this Court has the power "to continue the development of this (admiralty) law within the limits of the Constitution. *Romero*, supra at 361. Statutes should not be rewritten, and as the Court recognized in *Executive Jet*, this Court's decision was confined to situations where there was no legislation to the contrary.

Clearly, then, as long as the statutory prerequisites are met, there is admiralty jurisdiction under 46 U.S.C. §183 *et seq.*: (1) the structure seeking the benefit of the Act must be a "vessel" within the meaning of §§183 and 188(a); and, (2) the liabilities must exceed the value of the owner's interest in the vessel. All of these prerequisites have been met here. Appellant contends that the owner's right to limit liability is distinct from the issue of whether the claimants have a right to recover for a tort in admiralty. The Limitation of Liability Act created a species of admiralty jurisdiction, distinct from the general admiralty jurisdiction in tort, to which the "maritime nexus" test of *Executive Jet* is inapplicable.

[8] Following the lead of the Supreme Court other cases have confirmed the jurisdiction of admiralty courts in limitation cases where the claims asserted were non-maritime. *THE ATLAS NO. 7*, 42 F.2d 480 (S.D.N.Y. 1930); *THE WICHITA FALLS*, 15 F.Supp. 612 (S.D. Tex. 1936); *Tracy Towing Line v. Jersey City*, 105 F.Supp. 910 (D.N.J. 1952); *The City of Bangor*, 13 F.Supp. 648 (D. Mass. 1936); *In Re Pennsylvania R. Co.*, 48 F.2d 559 (2d Cir. 1931); *In Re Highland Nav. Corp.*, 24 F.2d 582 (S.D.N.Y. 1927); *THE No. 6*, 241 Fed. 69 (2d Cir. 1917). In fact, the rule is so well established that Gilmore and Black say:

> "The hornbook law of matter today is that §189: (1) extended the Limitation Act to cover non-maritime claims. . ."

Gilmore and Black, *The Law of Admiralty*, supra at p. 846.

The Ninth Circuit has noted:

> "The Supreme Court upheld the Act in *Richardson v. Harmon*, supra, even though it considered the Act as an extension of admiralty jurisdiction to theretofore non-maritime torts."

United States v. Matson Nav. Co., 201 F.2d 610 (9th Cir. 1953).

Under all the foregoing authorities it is clear that the Limitation Act itself confers broader *statutory* jurisdiction than would exist solely under an analysis of *constitutional* jurisdiction. The District Court erred in failing to recognize this crucial distinction.

2. According to *Richardson v. Harmon*, 222 U.S. 96 (1911) §189 of the Limitation Act established a Basis of Admiralty Jurisdiction Separate From Admiralty Jurisdiction in Tort.

Congress, by enacting 46 U.S.C. §183, *et seq.* to enable vessel owners to limit their liability, supplemented the federal court's admiralty jurisdiction in tort. This has not always been true. After Congress first passed the Limitation Act in 1851, it was considered that the Act "embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts." See *Richardson*, supra at 103. However, in 1884, Congress amended the Act by adding §189, which provides:

> The individual liability of a shipowner shall be limited to the proportion of *any or all debts and liabilities* that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending:

> *Provided*, that this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. June 26, 1884, c. 121, §18, 23 Stat. 57 (emphasis added).

Richardson was the first case in which this Court considered the meaning of §189. The vessel owner in *Richardson* sought to limit the liability arising out of an allision between his vessel and the abutment of a railway drawbridge. At that time, admiralty courts had no jurisdiction in tort over the damage communicated from ship to shore, and the district court accordingly dismissed the limitation petition for want of admiralty jurisdiction.

This Court reversed, holding that the 1884 amendment expanded the scope of the liabilities subject to limitation to include "all claims arising out of the conduct of the master and crew, *whether the liability be strictly maritime or from a tort non-maritime . . .*" 222 U.S. at 106, 32 S.Ct. at 30 (emphasis added). The claimants argued that Congress' specification that limitation was open to "any and all debts and liabilities that his individual share of the vessel bears" was only meant to encompass obligations *ex contractu* and not non-maritime liabilities in tort. This Court rejected this argument, starting that "the addition of the words 'and liabilities' would be tautology unless meant to embrace liabilities not arising from 'debts.'" *Id.* at 222 U.S. at 104, 32 S.Ct. at 29. According to the Court, "We therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts' not theretofore included." *Id.* 222 U.S. at 106, 32 S.Ct. at 30.

The conclusion is inescapable that because the right to limitation under §189 does not depend on the maritime nature of the *liability*, jurisdiction under the Limitation

Act is *not* merely coextensive with the general admiralty jurisdiction in tort. According to *Richardson's* interpretation of §189, a federal court's admiralty jurisdiction in tort and its admiralty jurisdiction under the Act are necessarily two separate species of admiralty jurisdiction, the latter extending jurisdiction to any and all liabilities arising out of the conduct of the vessel.

Everett Sisson has found only three cases subsequent to *Richardson* which have considered the application of §189 to non-maritime, or allegedly non-maritime, torts which occurred upon or in relation to navigable waters. In two of those cases, the courts followed *Richardson* and held that the Limitation Act applied to non-maritime torts. *Petition of Colonial Trust Co.*, 124 F.Supp. 73 (D. Conn. 1954); *The Trim Too*, 39 F.Supp. 271 (D. C. Mass. 1941). This case is the third.

The *Trim Too* involved a 48 foot yacht which exploded while in dry winter storage in Marblehead, Mass. The owner brought a petition to limit his liability, and the claimants moved to dismiss for lack of admiralty jurisdiction because the explosion had occurred on land. The court denied the motion to dismiss holding that the Limitation Act applied to non-maritime torts. According to the court, it was clear from §189 that Congress had amended the Limitation Act to further encourage shipping interests by "removing the restrictions on the character of the liabilities against which limitation might be asserted." 39 F. Supp. at 273. Such an interpretation was supported by *Richardson*, the court stated, for in that case the Supreme Court settled the principle that "admiralty jurisdiction extends to non-maritime torts in proceedings to limit liability." *Id.*

The *Trim Too* court also relied upon the then current edition of Benedicts' authoritative treatise on admiralty,

which cited *Richardson* and asserted that the Limitation Act provided an independent basis of admiralty jurisdiction:

> Proceedings by vessel owners to limit their liability as permitted by the Acts of Congress relating thereto are within the general maritime law and admiralty jurisdiction, and form an independent head of jurisdiction without regard to whether the claims limited against are such as might be sued upon the admiralty or not. Benedict on Admiralty, 6th Edition, Volume 1, Page 332; 5th Edition, Volume 1, Page 181.

Id. The current edition of Benedict is identical. I *Benedicts' on Admiralty* §248 (6th Edition 1986) (citing *Richardson*, *The Trim Too*, and *Colonial Trust Co.*).

Colonial Trust was a case remarkably similar to *The Trim Too*. In *Colonial Trust*, the owner of a 25 foot pleasure yacht sought to limit his liability when his vessel exploded while in dry winter storage in Branford, Connecticut. The court denied the claimants' motion to dismiss for lack of admiralty jurisdiction, quoting the paragraph above from Benedict, holding that "the statute should be liberally construed to encourage the building, maintenance and operation of sea-going vessels, and it applies to non-maritime as well as maritime torts. 124 F.Supp. at 75. *See also*, *Just v. Chambers*, 312 U.S. 383, 386, 61 S.Ct. 687, 690 (1941), reh. den. 312 U.S. 716 (1914) ("The Limitation Act extends to tort claims even when the tort is non-maritime"); *Tracy Towing Line, Inc. v. Jersey City*, 105 F.Supp. 910, 913 (D.N.J. 1952) ("The Court has jurisdiction of a proceeding to limit liability even where the tort is non-maritime in character"); Gilmore & Black, *The Law of Admiralty* 37-40 (2nd Ed. 1975) ("The hornbook law of the matter today is that §189 . . . extended the Limitation Act to cover non-maritime claims").

Despite the clear import of these decisions and authorities to the contrary, the Seventh Circuit in the present limitation proceeding dispensed with *Richardson v. Harmon*, in a most summary fashion.

3. The *Executive Jet* Decision Did Not Change The Jurisdictional Effect of §189 of The Limitation Act as Established by *Richardson v. Harmon*.

The decision of this Court in *Executive Jet* establishing a "maritime nexus" test in addition to the traditional "situs" requirement for admiralty jurisdiction in tort did not change the meaning placed upon §189 of the Limitation Act by the Court sixty years earlier in *Richardson v. Harmon*. The Court's sole concern in *Executive Jet* was the scope of a federal court's admiralty jurisdiction *in tort* under 28 U.S.C. 1333(1), as this was the ground of jurisdiction invoked in that case. *Id.* at 409 U.S. at 251, 93 S.Ct. at 496.

However, the rule formulated by the Court in *Executive Jet* affects the rule of *Richardson* only if *Richardson* was a case which decided some aspect of admiralty jurisdiction in tort. On the contrary, as noted above, *Richardson expressly* held that the Limitation Act was intended by Congress to apply to maritime and non maritime torts. 222 U.S. at, 106, 32 S.Ct. at, 30. *Richardson* did *not* hold that §189 of the Act effectively expanded admiralty jurisdiction in tort to cover injuries which originated on navigable waters but were consummated on land. Rather, the *Richardson* Court construed an Act of Congress as providing a separate source of admiralty jurisdiction which defendant shipowners might invoke irrespective of the maritime nature of the liability sought to be limited.

Moreover, *Executive Jet* did not propound jurisdictional prerequisites for all species of admiralty jurisdiction. For

instance, the maritime nexus test does not apply to admiralty jurisdiction in contract. Yet most importantly, the Court's express holding was "*in the absence of legislation to the contrary*, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." 409 U.S. at 274, 93 S.Ct. at 507, 34 L.Ed.2d at 471. Clearly, this Court recognized that its new test did not apply to Congressional legislation which conferred additional jurisdiction in admiralty.

The Court cited a specific example of such jurisdictional legislation: the Death on the High Seas Act (DOHSA), 46 U.S.C. §§761-768.[9] In a footnote, the Court indicated that jurisdiction would "clearly" lie in a federal admiralty court when an aircraft crashed on the high seas beyond a marine league from the shore of a state:

> Of course, under the Death on the High Seas Act, a wrongful death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a state may clearly be brought in a federal admiralty court.

409 U.S. at 271 n.20, 93 S.Ct. at 506 n.20, 34 L.Ed.2 at 469 n.20.

[9] §761 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decendent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

The clear import of this footnote is that a federal court, sitting in admiralty, has jurisdiction over a wrongful death claim in an aviation accident on the high seas simply by virtue of it having occurred over one marine league from the shore of a state. Because of the legislative grant of jurisdiction, it does not need to satisfy a maritime nexus test. Moreover, the Court postulated that *in the absence of DOHSA*, a sufficient relationship to traditional maritime activity might nevertheless, be found in an aviation accident upon the high seas because the aircraft "would be performing a function traditionally performed by waterborne vessels." *Id.* The Fifth Circuit recognizes the independence of DOHSA actions from the *Executive Jet* nexus test. *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1109 (5th Cir. 1982).

Because the Supreme Court expressly held that "legislation to the contrary" was beyond the scope of its decision in *Executive Jet*, the Seventh Circuit was simply incorrect in finding petitioner's reliance on *Richardson* "misplaced." Section 189 is jurisdictional *legislation* and not constrained by this Court's holding in *Executive Jet*.

4. The Admiralty Extension Act Is Not A Codification of *Richardson v. Harmon* and Does Not Change The Meaning Of §189 Of The Limitation Act.

The Seventh Circuit asserted that the Extension of Admiralty Jurisdiction Act 46 U.S.C. §740 eliminated the need for the rules in *Richardson*.[10] Pet. App. 16a.

[10] 46 U.S.C. §740 provides in relevant part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or party caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

If this statement is taken at face value, it means essentially that *Richardson* and the Extension Act are equal in meaning. In other words, the court implies that *Richardson* held torts caused by a vessel on navigable waters are within admiralty jurisdiction in tort notwithstanding that such injury is consummated on land. *Richardson* did in fact involve damage to a structure on land caused by a vessel. It did not, however, extend the general admiralty jurisdiction *in tort* over that damage: it found a basis for jurisdiction in the meaning of the Limitation Act.

Subsequent to *Richardson*, the type of tort involved in that case *remained* outside of the general admiralty jurisdiction in tort. The same year as the *Richardson* decision, the Court handed down *Martin v. West*, 222 U.S. 191, 32 S.Ct. 42, 56 L.Ed 159 (1911), which held precisely that there was no admiralty jurisdiction when a negligently operated ship on navigable waters collided with a bridge. In fact, the legislative purpose of Congress' enactment of §740 was to overrule *Martin*, not codify *Richardson*, and extend admiralty jurisdiction *in tort* to such cases. *Adams v. Harris County, Texas*, 316 F.Sup. 939, 941 (1970); Sen. Rep. No. 1593, 1948 U.S. Cong. & Adm. News p. 1898. To say that §740 "codified" *Richardson* is to miss the point of both *Richardson* and 46 U.S.C. §740. If *Richardson* and §740 have equal meaning, then §740 was unnecessary and the Supreme Court handed down mutually inconsistent decisions in the same year.

Rather, the meaning of *Richardson* is not to be found in the particular fact pattern before the Court, but in the statutory language of §189. In §189, Congress was concerned with a right to limitation of liability more extensive than the right to recover for a tort in admiralty; whereas in 46 U.S.C. §740, it was simply concerned with a partial extension of admiralty jurisdiction in torts which

were otherwise only cognizable in admiralty through their statutorily mandated inclusion in a limitation of liability proceeding. Thus, there is a fundamental jurisdictional distinction between the right of a shipowner to seek limitation and the right of the claimant to sue in admiralty reflected in the difference between *Richardson* and *Martin*.

5. *Richardson v. Harmon* Must Not Obscure the Impact of the Fire.

While the interplay between the Limitation Act and *Richardson* is important to an analysis of the scope of jurisdiction under the Act, it must not obscure the fact that the amount of damages to other boats in this case far exceeded the damage to the dock. The fire did damage the dock, but that should not be the only focus here. The right to limitation for the claims of other vessel owners is also sought by the Petitioner, and those claims have nothing to do with 46 U.S.C. § 740 and the Seventh Circuit's mistaken notion that §740 had eliminated the need and reason for the rule in *Richardson* Pet. App. 16a.

6. This Court Need Not Reconsider Its Opinion in *Richardson v. Harmon*.

This Court's decision in *Richardson* held that district courts may take jurisdiction over non-maritime tort claims brought in limitation of liability proceedings. This is the correct holding as, the basis for that holding, the 1884 amendment to the Limitation of Liability Act, is still the law of the land in 46 U.S.C. §189. *Richardson* is also consistent with this Court's decision in *Executive Jet*, because the latter decision carved out an exception for the application of the nexus standard where there was "legislation to the contrary". 409 U.S. at 268, 274 and n.26.

The Petitioner does not believe that the basis for this Court's decision in *Richardson* is subject to question. This Court read the original Act and the 1884 amendment correctly. The additional language, added in the 1884 amendment ("all debts and liabilities") was not a restatement of the prior language, but clearly shows that Congress intended to make limitation available to vessel owners in *all* cases of loss and injury, contract, tort or otherwise.

The Extension of Admiralty Jurisdiction Act 46 U.S.C. §740 did not diminish the importance and correctness of *Richardson*. The main thrust of that Act is to allow persons or property to claim for damages or injury caused by a vessel when such damage or injury is consummated on land. It does not deal with limitation of liability. Section 189, as interpreted by *Richardson*, is more broad in its scope as it applies to "all debts and liabilities" of a vessel owner and is not limited to cases of "damage or injury" as provided under 46 U.S.C. §740. While this court may have been concerned in *Richardson* with artificial limitations on admiralty jurisdiction arising from the locality test, the clear meaning of the language in §189 has not changed.

The Seventh Circuit also relied on the fact that the original purpose of the Limitation of Liability Act was to encourage shipbuilding. However, as discussed above, the majority of courts and commentators have all concluded that the Limitation of Liability Act applies to "all vessels" which would include recreational craft such as the M/V ULTORIAN. Also, this Court has eliminated the importance of commercial activity to a determination of admiralty jurisdiction in its opinion in *Foremost*. Now the test is whether the claim arises from a wrong having a significant relationship to traditional maritime activity and not whether the concerned interests are commercial.

Finally, the Petitioner does not believe that state interests will be jeopardized by the continued adherence to *Richardson*. This Court has long recognized that admiralty and maritime issues are issues which should be within the exclusive provence of federal courts. So long as there is a relationship with admiralty and maritime interests, federal jurisdiction should be available to a vessel owner.

CONCLUSION

The Petitioner urges this Court to reject the restrictive interpretation of *Foremost* by the Seventh Circuit Court of Appeals and reverse its opinion. The grant of admiralty and maritime jurisdiction should be broadly construed so as to include torts or wrongs occurring on navigable waterways involving watercraft or artificial contrivances which are used or capable of being used for transportation on water. Only in this fashion will there be a uniform maritime law applicable to all vessels whether operating in commerce or for pleasure.

The Petitioner also urges this Court to uphold the majority view and find that the Limitation of Liability Act is available to recreational craft and provides a separate and independent basis for admiralty jurisdiction. In this regard, *Richardson v. Harmon* should not be reconsidered, but viewed as a correct interpretation of the statutory language in the amendment to the Limitation of Lia-

bility Act to include all liabilities of "all vessels". *Richardson* also found that the Limitation of Liability Act afforded a separate and independent basis for jurisdiction.

Respectfully submitted,

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[illegible] ARGUMENT

No. 88-2041

In The

Supreme Court of the United States

October Term, 1988

IN THE MATTER OF:
THE COMPLAINT OF EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,

Petitioner,

v.

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF ON THE MERITS BY RESPONDENTS BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants

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QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. §1333 and Article III, §2, of the United States Constitution.

2. Whether a federal court may assert admiralty jurisdiction over a limitation of liability action when the underlying tort fails to qualify as maritime because it is unconnected to traditional maritime activity.

3. Whether this Court should reconsider its decision in *Richardson v. Harmon*, 222 U.S. 96 (1911).

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Everett A. Sisson, as owner of the motor yacht, the M/V ULTORIAN, and the Respondents, Burton B. Ruby, Fireman's Fund Insurance Company*, Port Authority of Michigan City, Joseph T. Charles, Cincinnati Insurance Company, Continental Insurance Company, John P. Walter and Roger Dillon as claimants in the limitation proceeding.

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* Fireman's Fund Insurance Company's parent corporation is The Fund American Companies, Inc. All of its subsidiaries are wholly owned.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

No. 88-2041

In The

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October Term, 1988

IN THE MATTER OF:
THE COMPLAINT OF EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,

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BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON THE MERITS BY RESPONDENTS BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants

STATEMENT OF THE CASE

The Appellant's Statement of the Case contains the following omissions or mistatements of material facts:

Although there has been no judicial determination of the cause of the fire which erupted in the area of the washer/dryer unit on board Petitioner's yacht, Petitioner has alleged that the fire was caused by a defective washer/dryer unit. J.A., 1a-2a; J.A., 25a; J.A., 37a. Petitioner's Statement of the Case identifies three enumerated possible causes of ignition, but these are not based upon evidence in the record. There is also evidence that the fire was caused by Sisson's negligence. *Sisson v. Hatteras, et al.*, 1989 A.M.C. 2846, 2851 (N.D. Ill. 1989).

The alleged value of the M/V ULTORIAN after the fire is $800.00 and Petitioner seeks to limit his liability to $800.00.

SUMMARY OF ARGUMENT

The Seventh Circuit properly affirmed dismissal of Sisson's Petition for Exoneration or Limitation of Liability based on lack of federal subject matter jurisdiction. This case involves a fire which erupted at a washer/dryer unit aboard a pleasure yacht. The fire spread to other pleasure boats and a marina which harbored only pleasure boats. Therefore, this non-maritime tort did not involve commerce, commercial vessels or navigation.

The Seventh Circuit's ruling properly balances the federal interest in maritime commerce while preserving

to the states jurisdiction over non-maritime, non-commercial torts which would not potentially disrupt maritime commerce. Such a balance is particularly necessary because the proliferation of pleasure boats upon the navigable waterways has resulted in an increase in the number and assortment of "garden variety" tort claims which do not impact any federal interest and are more properly reserved to the states. The constitutional mandate, granting admiralty and maritime jurisdiction to federal courts, is based upon the federal concern over maritime commerce and the federal expertise over maritime navigation. When a tort which occurs on navigable water does not involve commerce or navigation and would not potentially disrupt maritime commerce, the federal courts lack subject matter jurisdiction.

The Seventh Circuit's opinion permits sufficient flexibility to evolve a case-specific precedent which focuses upon commerce without unduly restricting a federal district court from assuming federal jurisdiction where mandated. The Petitioner urges a rigid test which involves the application of admiralty jurisdiction to non-commercial, non-maritime torts when the tort fortuitously occurs upon a vessel. Such a rule would burden the federal courts and produce an inequitable result. The Seventh Circuit's opinion is consistent with the prior rulings of this Court, limiting federal admiralty jurisdiction to torts involving traditional maritime activities and therefore, it should be affirmed.

The Limitation of Liability Act does not confer independent federal jurisdiction. The Act was adopted for the sole purpose of promoting maritime commerce and its

application to non-commercial, non-maritime torts is neither authorized by the Act nor contemplated by its framers. Jurisdiction under the Act is co-extensive with general federal admiralty jurisdiction.

Richardson v. Harmon, 222 U.S. 96 (1911) should be reconsidered. Respondent believes that the *Richardson* case merely expands the scope of the Limitation of Liability Act to include damage to a non-maritime structure. Since this rule was codified in the Extension of Admiralty Act, the *Richardson* decision is without precedential value. Jurisdiction under the Act is still co-extensive with general admiralty jurisdiction and *Richardson* does not permit a separate "species" of federal admiralty jurisdiction under the Act.

However, if this Court interprets *Richardson* to permit jurisdiction under the Act even where the criteria for admiralty jurisdiction are otherwise lacking, then *Richardson* should be reconsidered in light of the changes in modern society and the purpose of the Limitation of Liability Act. The Act was passed to encourage an American merchant marine at a time when non-maritime torts were unforeseeable. Permitting pleasure boaters to limit their liability for "garden variety" torts subverts the intent of the Act and the reach of state tort law, producing an inequitable result. The "nexus" test should be applied to claims under the Act and *Richardson* should be reconsidered in light of this Court's recent decisions regarding admiralty jurisdiction.

ARGUMENT

I.

A FIRE WHICH SPREADS FROM A PLEASURE YACHT DAMAGING A NON-COMMERCIAL MARINA AND OTHER PLEASURE YACHTS DOES NOT PRESENT A SUFFICIENT NEXUS TO TRADITIONAL MARITIME ACTIVITY TO CONFER FEDERAL ADMIRALTY JURISDICTION

A. Federal Jurisdiction Is Limited To Occurrences On Navigable Waters Which Have A Nexus To Traditional Maritime Activities.

Judge Cudahy, writing for the Seventh Circuit, opened his opinion by acknowledging that "[h]ad this case arisen prior to 1972, it would have fallen within the admiralty jurisdiction." J.A. at 2a. This is true because, until this Court's decision in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), all federal courts applied the "locality" test which conferred admiralty jurisdiction to any tort occurring upon the high seas or navigable waters of the United States. *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866). This Court recognized the need to restrict federal jurisdiction in its decisions in *Executive Jet Aviation, Inc. v. City of Cleveland, supra*, and *Foremost Insuranc. Company v. Richardson*, 457 U.S. 668 (1982). In *Executive Jet*, this Court ruled that the locality of the occurrence, by itself, is an inadequate basis for assuming admiralty jurisdiction because modern life poses many instances of non-maritime torts occurring fortuitously upon navigable waters but over which the federal judiciary has no recognizable interest. Accordingly, this Court ruled that before admiralty jurisdiction could be invoked in tort cases, the district court must find both a maritime

"locality" and "a significant relationship to traditional maritime activity". *Executive Jet*, 409 U.S. at 268.

This Court explained the need to exclude certain actions from federal court based upon the federal interest in commerce and the modern proliferation of pleasure boats involved in non-commercial non-maritime torts. The locality test arose in an era when non-maritime torts occurring fortuitously upon the high seas were difficult to foresee or even imagine. *Executive Jet*, 409 U.S. at 254. This Court recognized that these non-commercial, non-maritime torts do not pose admiralty concerns which should be litigated in federal court. Accordingly, this Court restricted federal admiralty jurisdiction by requiring a nexus to traditional maritime activity and identifying commerce and navigation as the traditional maritime activities which give rise to federal admiralty jurisdiction. *Id.* at 255-56.

B. Commerce Is The Key Element Giving Rise To Federal Admiralty Jurisdiction.

Today, courts are confronted with torts occurring on navigable waters and aboard vessels which do not involve commerce or navigation, the two benchmarks of federal interest. The Seventh Circuit correctly ruled that such torts do not bear the requisite nexus to confer federal jurisdiction and should be left to state courts' jurisdiction. Petitioner would have this Court revert to a strict locality test, arguing that the Seventh Circuit's opinion places undue stress upon commerce as the key factor

giving rise to federal jurisdiction. In making this argument, Petitioner misses the proverbial boat. Commerce *is* the foundation for federal involvement in maritime and admiralty matters. The admiralty jurisdiction of the federal courts derived from the founding fathers' conviction that the nation needed a uniform body of laws, in general harmony with the laws of other maritime nations, for the conduct of the shipping business. *See, Foremost Insurance v. Richardson*, 457 U.S. at 680, n.3. (1981) (Powell, J., dissenting). Regulation of the shipping industry was closely related to the conduct of foreign affairs and the admiralty jurisdiction was created to serve commercial shipping interests. Stolz, *Pleasure Boating and Admiralty, Erie at Sea*, 51 Cal.L. Rev. 661 (1963); Gilmore and Black, *The Law of Admiralty* (2d Edition 1957), Chapter 1; 7A J. Moore, *Federal Practice*, Admiralty 325(5) (2d Ed. 1976). Professor Black, cited in the *Executive Jet* decision, pointed out that the mention of "admiralty and maritime jurisdiction" in Article III of the Constitution demonstrated "a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry." Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 262 (1950). *See also*, Gilmore & Black, *The Law of Admiralty* pp. 27-28 (2d Ed. 1957); Calamari, *The Wake of Executive Jet – A Major Wave Or a Minor Ripple*, IV The Maritime Lawyer 52 (1979).

"Admiralty is a specialized area of law that, since its ancient inception, has been concerned with the problems of seafaring commercial activity." *Foremost*, 457 U.S. at 679 (1982) (Powell J., dissenting). Commerce is the key element which provides the foundation for federal involvement: international commerce upon the high seas,

interstate commerce upon the inland waterways and a national interest in a competitive, vibrant marine transport and shipping industry. *In Re: Three Buoys Houseboats Vacation, U.S.A., Ltd.*, 878 F.2d. 1096, 1099 (8th Cir., 1989).

When this Court defined "navigable waters of the United States" over which federal courts could exercise admiralty jurisdiction, it identified the commercial foundation for the constitutional grant of federal admiralty jurisdiction:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 77 U.S. 557, 563 (1870).

Petitioner grumbles that prior decisions, including the Seventh Circuit's *Sisson* decision, place too great weight upon commerce as a factor in determining federal admiralty jurisdiction. This argument rings hollow in light of the overwhelming and uncontroverted pronouncements of courts and commentators alike. Commerce is

the foundation upon which admiralty laws in every society, including our own, are erected and sustained. T. Etting, *The Admiralty Jurisdiction in America* 7-8 (1879), cited in *Foremost*, 457 U.S. at 678, n.2 (1981) (Powell, J., dissenting) Commerce, therefore, is the starting point in every analysis of the scope and reach of federal admiralty jurisdiction.

C. Traditional Maritime Activities Include Commerce And Navigation

Federal jurisdiction is extended to include navigation upon commercial waterways because of "the potential effect of non-commercial maritime activity on maritime commerce." *Foremost*, 457 U.S. at 675. Navigation is a maritime activity which may have a direct and potentially injurious impact upon maritime commerce. This Court explained the federal interest in navigation in its *Foremost* decision:

> The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasures boats on navigable waters has a significant relationship with maritime commerce.

Id., at 675. There must be uniform rules of navigation which apply to all vessels on our nation's waterways. Disparate "rules of the road" for pleasure boats and commercial vessels would likely result in collisions between them, seriously affecting maritime commerce. There is a legitimate federal interest in seeing that bodies of water susceptible to commerce are free from obstacles

that would impede maritime commerce. Therefore, while commercial activity is generally required to establish a significant relationship to traditional maritime activity, improper navigation may also support federal maritime jurisdiction.

However, in *Foremost*, this Court cautioned that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support admiralty jurisdiction." *Id.*, at 675 n.5. Therefore, the Seventh Circuit evolved a test which is designed to identify the type of non-commercial maritime activity which justifies federal jurisdiction:

> In our view, a persuasive interpretation of *Foremost* would confine the admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (i) has a potentially 'disruptive impact' on maritime commerce and (ii) involves the 'traditional maritime activity of navigation.'

Sisson, J.A. at 8a.

D. The Seventh Circuit Properly Limited Admiralty Jurisdiction In Tort Cases To Those Involving Commercial Maritime Activity Or To Those Involving Non-Commercial Activity In Which The Wrong Has A Potentially Disruptive Impact On Maritime Commerce And Involves Navigation.

New technologies and an expanded economy have placed a proliferation of pleasure craft upon the navigable waters. There are, therefore, more pleasure craft in navigation and also more non-commercial common-law

torts which happen to occur upon these pleasure craft. In order to strike the necessary balance between the legitimate federal interest in maritime commerce and the necessary exclusion from federal court of "garden variety" torts, this Court restricted federal admiralty jurisdiction to torts occurring upon navigable waters which also bear a significant relationship to traditional maritime activity. The challenge presented by this case is to define clearly the traditional maritime activities which will justify federal jurisdiction over tort actions. The Seventh Circuit's opinion does just that by focusing upon the dual concerns of navigation and commerce.

Ships other than commercial vessels were almost unheard of in the eighteenth and nineteenth centuries. *Foremost*, 457 U.S. at 680. (1981) (Powell, J., dissenting). Accordingly, non-maritime torts on non-commercial vessels were a rarity. According to the United States Bureau of Census, there were only 502 yachts and fishing boats registered in the United States in 1880,[1] and only 798 in 1890[2]. By 1926, there were 5,293 non-commercial vessels registered in the United States, but a large portion of those were fishing vessels[3]. By comparison, there were

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[1] Dept. of Interior, Report on the Agencies of Transportation in the United States (1880 Census), in a report titled: *History of Steam Navigation*, p. 692 (1883).

[2] Dept. of Interior, Report on Transporation Business in the United States at the Eleventh Census: 1890; Part II – Transportation by Water, p.14, Table 18 titled: Yachts – Number, Tonnage, and Valuation of Yachts and Pleasure Boats.

[3] United States Bureau of the Census, *Water Transportation* 1926, p.125 *et. seq*. The Bureau of the Census defined non-

(Continued on following page)

over 13 million pleasure boats in use in 1977[4], and almost 17 million in 1987[5]. The Seventh Circuit's test satisfies the federal need to control maritime commerce and all activities which might significantly impact maritime commerce while saving to the states jurisdiction over non-maritime torts which do not rise to the level of federal interest in commercial activity. The Seventh Circuit's opinion relieves the district courts from strictly analyzing the types of instrumentalities and accidents involved in each case while preserving flexibility by allowing the district courts to inquire whether the non-commercial activity would have a potentially disruptive impact on maritime commerce.

Petitioner urges this court to adopt an untried, and unreasonably rigid, test whereby any tort occurring on navigable waters and involving a vessel would confer admiralty jurisdiction. This test would involve the federal courts in the assumption of jurisdiction over ordinary tort

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(Continued from previous page)

commerical vessels for the purpose of the census statistics as all vessels which are not engaged directly or indirectly in the transporation of freight or passengers. Non-commercial vessels include fishing vessels, yachts and vessels engaged in miscellaneous services such as cable boats, dredges, pile drivers, inspection boats, patrol boats, fire boats, etc.

[4] Department of Transportation, National Transporation Statistics Annual Report, p.35 (1989).

[5] In 1987, there were almost 17 million recreational boats registered with the Coast Guard, showing a 2.4% increase from the prior year. Between 1977 and 1987, there was an average annual increase of 2.5% in the number of recreational pleasure boats in the United States. Department of Transporation, National Transportation Statistics Annual Report, p.35 (1989).

cases far beyond the original contemplation of admiralty jurisdiction in the Constitution and laws of the United States and would gut the "savings to suitors" clause contained in 28 U.S.C. 1333. *Foremost*, 457 U.S. at 685 (1981) (Powell, J., dissenting).

Recognizing the federal interest in maritime commerce, the Seventh Circuit's test permits non-commercial maritime torts to be litigated in the federal courts if the federal district court is convinced that the facts presented involve navigation which has a potentially disruptive impact upon maritime commerce and which requires the special federal expertise in admiralty. If navigation or any other non-commercial maritime activity has no potentially disruptive impact upon maritime commerce, there is no reason for the federal courts to apply admiralty laws.

The admiralty laws were specifically designed to protect and encourage commercial shipping. The weekend fisherman or water-skier has no interest in the traditional maritime laws involving general average, libel, maintenance and cure, limitation of liability, captures and prizes and laws concerning cargo. The weekend fisherman or water-skier is more familiar with the state tort laws which govern recoveries for negligent acts and which are properly in state courts or in federal courts pursuant to diversity jurisdiction. Why should a weekend fisherman or pleasure boat owner obtain the benefit of the Limitation of Liability Act contained in the admiralty laws when his negligence causes personal injury or property damage which has no potentially disruptive impact upon maritime commerce and which, under applicable state tort law, would subject him to unlimited legal liability? This

result is inappropriate in a court of equity such as the admiralty court, but this is precisely the result which the Petitioner seeks.

Petitioner urges this Court to apply admiralty jurisdiction and, by extension, admiralty laws to non-commercial non-maritime torts when the tort fortuitously occurs upon a vessel.[6] It is easy to see that such a rule would involve the federal judiciary in the resolution of "garden variety" tort cases, burdening the federal courts and frustrating the purposes of state tort law. There are many examples of "garden variety" tort claims which do not properly belong in federal court, but which would end up in admiralty under the Petitioner's suggested rule of law. A person who slips and falls on a negligently maintained carpeted ladder aboard a pleasure boat docked at a non-commercial marina would be enjoined from proceeding in state court and subject to federal maritime jurisdiction, including the Limitation of Liability Act, unless this Court affirms the Seventh Circuit's decision.[7] Two children using rowboats to net crawfish from a stream ancillary to the Mississippi River who collide and sink their

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[6] *Foremost*, 457 U.S. at 685 n.9 (1981) (Powell, J., dissenting), quoting from Swain, *Yes, Virginia, There is an Admiralty: The Rodriguez Case*, 16 Loyola L. Rev. 43 (1970): "[t]he term 'jurisdiction' denotes both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision to be applied by those courts considering the controversy. This is so because a court of admiralty sits solely to administer and apply the maritime law."

[7] *See, In The Matter of Foster J. Hepperly*, No. 89 1082-B (S.D.Cal.), *appeal docketed*, No. 90-55373 (9th Cir. Mar. 27, 1990).

boats would be subject to federal maritime jurisdiction.[8] Two people on jet skis who collide near an ocean beach filled with recreational sunbathers and pleasure boaters would be subject to limited liability and other inappropriate admiralty laws.[9] This does not make sense. Even two children on styrofoam rafts would be entitled to federal admiralty jurisdiction under Petitioner's proposed rule. Such a rule does not advance federal interests, but rather, violates the constitutional principle of federalism, denies states the right to regulate and adjudicate local tort actions and produces an inequitable result.

In Minnesota, the land of ten thousand lakes, the Mississippi River, a navigable waterway, grows very wide at certain points, forming what local residents call lakes, such as Lake Pepin, Spring Lake and Pigs Eye Lake. Of course, these are not lakes at all; they are wide portions of the Mississippi River. These "lakes" often have separate channels for barge and other commercial traffic and in the summertime, they are filled with recreational boats of all types, from houseboats to rowboats, yachts to windsurfing boards. There are often inland lakes only miles away which are also filled with recreational boaters. The Admiralty Court is a court of equity. Why should the boaters in Spring Lake (on the Mississippi River) be enjoined from pursuing their tort claims in state court, subject instead to admiralty laws which were drafted and

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[8] *See, Foremost*, 457 U.S. at 684 (1981) (Powell, J., dissenting).

[9] *See, In the Matter of the Complaint of Keys Jet Ski, Inc.*, 893 F.2d 1225 (11th Cir. 1990)

enacted to apply to commercial vessels, while their neighbors on White Bear Lake are free to pursue tort remedies in state court? Obviously, they should not. The Seventh Circuit's opinion, by distinguishing between non-maritime torts and torts involving navigation which have a potentially disruptive impact on maritime commerce, prevents this inequitable result while preserving the federal interest in regulating maritime commerce.

The Seventh Circuit's opinion requires that a non-commercial tort involve navigation as a prerequisite to federal admiralty jurisdiction. This is appropriate because navigation is the principal non-commercial activity which could seriously disrupt maritime commerce. According to the Coast Guard, there were 35 fatalities resulting from the loss of a U.S. vessel in 1987 and while 33 resulted from foundering or collision (involving navigation), only two resulted from fire.[10] Errors in navigation or operation account for the vast majority of problems encountered in maritime disasters and presents the most likely cause of problems affecting maritime commerce. In 1983, there were 7,344 vessels involved in accidents in the United States, of which 3,562 collided with another vessel, 661 collided with a fixed object, 182 collided with a floating object, 663 capsized, but only 63 (less than 1%) had fires or explosions involving something other than fuel.[11] Of

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[10] U.S. Department of Transporation, National Transporation Statistics, Annual Report, p.74 (1989).

[11] U.S. Department of Transportation, United States Coast Guard, *Boating Statistics*, p.19 (1983). There were also 344 fires or explosions involving fuel.

course, in this case, Sisson's yacht had a non-fuel fire at a washer/dryer unit and neither commerce nor navigation were involved. The Seventh Circuit's test requires navigation because this Court has, throughout this nation's history, recognized commerce and navigation as the two paramount federal interests in admiralty law. Furthermore, error or mishap in navigation or operation are the specters which can potentially disrupt maritime commerce.

The Seventh Circuit's two-prong test permits sufficient flexibility to evolve a case-specific precedent which focuses upon commerce without unduly restricting a federal district court from assuming federal jurisdiction when mandated. The test permits inquiry into the *potential* for disruption of maritime commerce, thus allowing federal jurisdiction even where maritime commerce was, fortuitously, not affected in the individual case but could be in future cases. Of course, in this case, there were no commercial vessels at the marina and this case clearly falls outside the purview of federal jurisdiction.

The Seventh Circuit did not adopt the "four-factor" test developed by the Fifth Circuit in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. den., Chicot Land Co., Inc. v. Kelly*, 416 U.S. 969 (1974). The four factors are:

1) Traditional concepts of the role of admiralty law;

2) the causation and nature of the injuries suffered;

3) the function and role of the parties; and

4) the types of vehicle and instrumentalities involved.

This test has been adopted by numerous circuits. *See* J.A., 8a, n.2.

The reasoning in *Sisson* is consistent with the use of these four factors and the two-prong *Sisson* test follows logically from a consideration of these factors. *In re: Complaint of American Auto, Inc.*, 1989 A.M.C. 1489, n.6 (N.D. Cal. 1989). Under *Sisson*, district courts have better guidance identifying the factors to be considered for admiralty jurisdiction. The causation, types of vehicles and instrumentalities must be commercial or must involve navigation. The function and role of the parties must establish a potentially disruptive impact upon maritime commerce. Traditional concepts of the role of admiralty law would apply to commercial vessels or non-commercial vessels involved in navigation if the occurrence potentially disrupts maritime commerce. Although the two approaches are consistent, Respondents urge this Court to adopt the *Sisson* two-prong analysis because it more clearly defines the factors to be considered while allowing adequate discretion to account for each particular case. Under either analysis, the district court's dismissal of *Sisson's* petition for exoneration or limitation of liability is proper.

E. This Supreme Court Has The Authority To Define The Scope Of Federal Admiralty Jurisdiction.

Article III, Section 2 of the United States Constitution provides that federal judicial power extends to all cases of admiralty and maritime jurisdiction. U.S. Const. art. III, §2. The federal statutes confer original jurisdiction to any civil case of admiralty or maritime matters, "saving

to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. §1333(1). We have already discussed the historical federal interest in maritime commerce and, by extension, in navigation. Throughout most of American history, claims involving maritime commerce or navigation would account for the vast majority of civil suits in admiralty.

There are no cases which distinguish between the constitutional grant of authority in these passages. Since their basic language is the same, we urge this Court to apply the *Sisson* test to federal admiralty jurisdiction, whether it arises under the Constitution or under federal statute.

F. The Seventh Circuit's Decision Is Consistent With Decisions Of This Court And Of Other Courts

The Seventh Circuit's decision is premised upon the clear, unambiguous language of this Court's decisions defining traditional maritime activity to be commerce or navigation. Other courts have recognized the same definition of traditional maritime activity. In *Whittington v. Sewer Construction Company*, 541 F.2d 427 (4th Cir. 1976), the court ruled that a shore-based injury inflicted by a winch and choker lacked a maritime nexus. In *Smith v. Knowles*, 642 F. Supp. 1137 (D.Md. 1986), there was no admiralty jurisdiction over a drowning incident off a pleasure boat which was not caused by any navigational error. In *Petrone v. U.S.*, 529 F. Supp. 295 (D.Md. 1981) admiralty jurisdiction was held not to exist because the

wrong complained of, a broken iron railing on a lighthouse, did not involve the maritime function of the lighthouse. In *Watson v. Massman Construction*, 850 F.2d 219 (5th Cir. 1988), a worker on a pier fell into the Mississippi River and drowned when he was hit by a compression hose attached to a boat. The Fifth Circuit affirmed dismissal for lack of admiralty jurisdiction because, considering the location, nature and manner of work, this case lacked the requisite maritime nexus for admiralty jurisdiction. In the recent case of *In The Matter of the Complaint of American Auto, Inc.*, 1989 A.M.C. 1489 (N.D. Cal. 1989), the district court dismissed the limitation proceeding of the owner of a boat which burned and sank in a Mexican harbor reserved for non-commercial vessels because it did not have a disruptive impact on commercial maritime activity and did not involve navigation. In *Lloyds of London v. Montauk Yacht Club*, 704 F. Supp. 1175 (E.D.N.Y. 1989), the court dismissed a claim for lack of admiralty jurisdiction where a fire started in a washer/dryer and destroyed a pleasure boat. In *Simone v. Genmar Industries, Inc.*, 1989 A.M.C. 2627 (S.D.N.Y. 1989), the court dismissed a claim against a boat manufacturer for tort and warranty liability for lack of subject matter jurisdiction, ruling that the boat, having been removed from the water, could not conceivably interfere with commercial shipping. In *Chi Shun Hua Steel v. Crest Tankers*, 708 F. Supp. 18 (D.N.M. 1989), the court dismissed a claim for lack of admiralty jurisdiction, ruling that the ship's flight to sea did not affect maritime service, commerce and navigation. The preceding cases all affirm the principle that absent maritime service, commerce and navigation, no admiralty jurisdiction exists.

II

THE LIMITATION OF LIABILITY ACT DOES NOT CONFER INDEPENDENT FEDERAL JURISDICTION

The Limitation of Liability Act, 46 U.S.C. §183-§189 (the "Act"), depends upon general admiralty jurisdiction, and a ship owner is not entitled to make claim under the Act unless he meets the "maritime nexus" test of *Executive Jet. Yacht Calibria* (In the Matter of the Complaint of Colquitt), 1975 A.M.C. 981 (D. Md. 1975); *Donily v. United States*, 381 F. Supp. 901 (D. Or. 1974). In the case of *In Re: Builder's Supply*, 278 F. Supp. 254 (N.D. Ia. 1968), the court dismissed the petition for limitation of liability, holding that the parameters of the Act and general admiralty law are the same, citing *Butler v. Boston and Savannah Steamship Co.*, 130 U.S. 527 (1889). *See also, Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *In Re: River Queen*, 275 F. Supp. 403 (D.Ark. 1967), *aff'd*, 402 F.2d 977 (8th Cir. 1978); *In Re: Stephens*, 341 F. Supp. 1404, 1407 (D. Ga. 1965); *In Re: Howser's Petition*, 227 F. Supp. 81 (W.D.N.C. 1964); *In Re: Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960).

Petitioner argues, without citation to any authority, that the Act provides an independent basis of federal jurisdiction. If the Petitioner's argument is accepted, any boat owner could limit his civil liability, whether or not the injury took place on navigable water, and whether or not the wrong involved a traditional maritime activity. This was not the intention of the drafters of the Act. *See, Benedict on Admiralty*, (6th Ed. 1986) §6. 1-42-43.

The United States Court of Appeals for the Eighth Circuit rejected the argument that the Act provides federal question jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1337 in the absence of admiralty jurisdiction. *In Re: Three Buoys Houseboats Vacation U.S.A.*, 878 F.2d 1096, 1100 (8th Cir. 1989). Citing Justice Holmes' precept that a "suit arises under the law that creates the cause of action" *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), the Eighth Circuit concluded that the Act is "more akin to a defense" and that "[a] defense that raises a federal question is inadequate to confer federal jurisdiction. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983))." *Id.* at 1100. The Eighth Circuit concluded that the Act's territorial application is coextensive with the territorial reach of admiralty jurisdiction and, therefore, jurisdiction is likewise coextensive. *Id.* at 1101.

In *Butler v. Boston and Savannah Steamship Co.*, 130 U.S. 527 (1889), this Court held that the law of limited liability of ship owners is co-extensive in its operation with the general admiralty and maritime jurisdiction. *Id.* at 557. This rule of law, which has never been successfully challenged, is fair, equitable and consistent with Congressional intent. The Act was adopted for the sole purpose of promoting maritime commerce.[12] The purpose of the Act

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[12] For judicial reviews of the history of the limitation principle, see Judge Ware's opinion in *The Rebecca*, 20 Fed.Cas. 373, Case No. 11.619 (D.Me. 1813); Justice Bradley in *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871); Justice Brown in *The Main v. Williams*, 152 U.S. 122 (1804).

(Continued on following page)

was to put American shipowning interests on a competitive equality with British interests and to promote an American maritime industry. In 1872, the Supreme Court supplemented the Act by rules of court. 80 U.S. (13 Wall.) xii-xiv. (1872). This Court explained its power to make rules on the basis that the subject was "one pre-eminently of admiralty jurisdiction." *Providence & New York S.S. Co. v. Hill Manuf. Co.*, 109 U.S. 578, 593-94 (1883). Commenting on the purposes and effects of the 1948 amendments to those rules, one federal court held that the rules are not "jurisdictional"; so that a trial court in its discretion

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(Continued from previous page)

The Act was principally taken from the English Act of 26 Geo. 3.c.86 (1786) and from the Revised Statute of Maine, 1840, c.47.

Senator Hamlin of Maine, Chairman of the Senate Committee on Commerce, who introduced the Bills, presented it as merely an adoption of English legislation: "Why not give to those who navigate the ocean as many inducements to do so as England has done? . . . That is what this bill seeks to do, and it asks no more." Of the heart of the bill, sections three and four, he said: "These two sections are substantially the English law." Sen. Rantoul of Massachusetts was willing to give even greater assurance: "They (the British) have made the alteration which we are now asked to make, and they have carried it further than this section of the bill carries it." Sen. Davis, from the same state, said: "It is simply placing our mercantile marine upon the same footing as that of Great Britian." 23 Cong.Globe 331-332, 713-720, 776-77, 31st Cong. 2d Sess. (Jan. 25, Feb. 26, March 3, 1851).

The Act was passed following a case in which American shipowners had been subjected to what was thought to be an unduly heavy burden of liability – a liability to which their competitors in other shipowning countries, notably England, were not subject. *New Jersey Steam Navigation Co. v. Merchants' Bank* (The Lexington), 47 U.S. (6 How.) 344 (1848).

may waive, overlook or ignore non-compliance. *The Nordic* (Petition of Canada S.S. Lines), 93 F. Supp. 549 (N.D. Ohio 1950). In all of the amendments to the Act and to the rules, neither Congress nor this Court ever expressly identified a separate basis of federal jurisdiction.

Numerous courts and commentators have written derisively about the Act. Gilmore and Black wrote: "The Limitation Act, originally passed to afford a measure of relief to a hard-pressed and highly competitive industry, has become a charter of irresponsibility for a few wealthy individuals." Gilmore & Black, *The Law of Admiralty*, §10-23 at 700 (1957).

The purpose for which the Act was passed is no longer compelling in an age of corporate ownership and liability insurance. Judge Seals collected considerable literature, judicial and academic, deploring the perversion of the original purpose of the Act in modern society in *Petition of Porter (The Yacht Julaine)*, 272 F. Supp. 282 (S.D. Tex. 1967).

Applying federal jurisdiction pursuant to the Act in the absence of general admiralty jurisdiction would contort the purpose and intent of the Act. It would permit limitation of liability in non-navigable waters, to non-maritime torts and, in short, would pre-empt and supplement state tort law whenever a tort occurs in a vessel. This was not the intent of the Act and is not an appropriate rule of law in our society.

One commentator called the Act an "[a]n act which is vicious in its impact, unconscionable in its result, and outmoded in an age of institutionalized protective insurance, [which] if it cannot be repealed outright, deserves

only a narrow, grudging and constrictive construction." Comment, 24 Nacca L.J. 223, 225 (1959). Justice Black, speaking for four members of a court divided 4-4-1, wrote:

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.

Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954) (dissenting opinion).

By applying the "nexus" requirement to suits brought under the Act, this Court would restrict its application to those cases which evidence a significant relationship to traditional maritime activity. Limited liability would not be available to "garden variety" tortfeasors who are not involved in traditional maritime activities. Until Congress acts to repeal or amend the Act, this Court's power to constrict its application lies in the power to define admiralty jurisdiction. This Court should exercise that prerogative in this case and declare that actions under the Limitation of Liability Act are subject to the enumerated requirements of general admiralty jurisdiction, including the "nexus" requirement as it is defined in *Sisson*.

III.

THIS COURT'S DECISION IN *RICHARDSON V. HARMON* SHOULD BE RECONSIDERED

Petitioner argues that this Court's decision in *Richardson v. Harmon*, 222 U.S. 96 (1911) stands for

the broad proposition that the Limitation of Liability Act, 46 U.S.C. §183-§189 expands federal jurisdiction beyond the confines of traditional admiralty jurisdiction and authorizes federal judicial involvement in cases not otherwise cognizable in admiralty court. Respondents believe that the *Richardson* decision may be understood to hold that federal admiralty jurisdiction includes maritime torts which cause non-maritime damage, extending federal law only where admiralty jurisdiction already exists. *Richardson* should be reconsidered in either case. If this Court reads *Richardson* as expanding federal jurisdiction, then the rule must be reconsidered in light of the significantly changed circumstances in today's society. On the other hand, if this Court reads *Richardson* as merely expanding the scope of the Act, then the case should be deemed to have no precedential value because this rule was codified in The Extension of Admiralty Act, 46 U.S.C. §740.

Petitioner argues that §189 of the Limitation of Liability Act expanded the scope of federal admiralty jurisdiction and asks this Court to construe the *Richardson* decision to hold that federal admiralty jurisdiction and jurisdiction under the Act are two separate "species" of federal jurisdiction. Accordingly, Petitioner argues that the *Executive Jet* nexus requirement does not apply to the Limitation Act "species" of federal jurisdiction, only to the general admiralty "species" of federal jurisdiction.

Of course, Petitioner again offers no citation to support this novel argument. The argument is fallacious when considered in light of the purpose of adding the "nexus" requirement: modern changes in society limiting the instances when admiralty expertise is necessary in

tort cases and concern for states' rights to adjudicate non-maritime tort claims. Statutes which expand or restrict federal jurisdiction are clear and unambiguous in their intent. Section 189 of the Limitation of Liability Act says nothing about federal admiralty jurisdiction.

Richardson v. Harmon involved a collision between a barge operating on navigable waters and a bridge. This court characterized the collision as a "non-maritime tort", but actually treated it as a maritime tort causing damage to a non-maritime structure. In fact, the *Richardson* court defined "non-maritime" tort as "due to a collision between the ship and a structure upon land . . . ". *Id.* at 106. Focusing upon the title and intent of the then recent amendment to the Limitation of Liability Act[13], the court extended the Act to non-maritime damage caused by a vessel in navigable waters. The intent of the amendment was identified by the *Richardson* court as follows:

> The avowed purpose of the original act was to encourage American investment in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. The same public policy is declared to be the motive of the act of which this section is a part.

Id. at 103. The court rejected the argument that the amendment was restricted to contract liability and instead, *inferred* that the policy of the Government was to

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[13] The act of June 26, 1884, 23 Stat. 57, initially called §18 of the Omnibus Shipping Act of 1884 is now codified at 46 U.S.C. §189.

confine the risk of an owner not personally at fault to his interest in the ship. Accordingly, the court ruled:

> We therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included.

Id. at 105.

Nowhere does this law or this decision identify or create a separate and independent basis of federal maritime jurisdiction. On the contrary, the *Richardson* court's holding is simply that §189 adds to the "old law." Thus, in *Richardson*, this Court construed §189 of the Act to apply to non-maritime torts, which it defined as a collision between a vessel in navigable waters and a structure upon land.

Respondent believes that the *Richardson* court's use of the term "non-maritime" denoted damage to a non-maritime structure. Petitioner would apply the term to any tort which does not meet the requisite criteria for federal admiralty jurisdiction. Such a leap is not justified. Construed as expanding the scope of limitation to include damage to non-maritime structures, the rule of law enunciated in *Richardson v. Harmon* was codified in 1948 in the Extension of Admiralty Act, 46 U.S.C. §740.

The Extension of Admiralty Act, 46 U.S.C. §740 (1982) extends admiralty jurisdiction to all cases of damage or injury caused by a vessel on navigable waters. This is precisely the result obtained in *Richardson* and accordingly, the *Richardson* holding has no precedential value.

Additionally, courts construing the Extension of Admiralty Act have ruled that actions arising thereunder

must meet the requisite elements of general admiralty jurisdiction because the Extension of Admiralty Act does not confer an independent basis of federal jurisdiction. *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing*, 644 F.2d 1132 (5th Cir. 1982), *cert. den. sub. nom., Valero Energy Corp. v. Sohyde Drilling & Workover, Inc.*, 454 U.S. 1081 (1981); *Yacht Mlanje, Lim. Procs.*, 709 F. Supp. 1123 (S.D. Fla. 1989). These courts reasoned that the Extension of Admiralty Act merely expanded existing law to encompass harm done or consummated on land and is, therefore, subject to the "nexus" requirement outlined in *Executive Jet*. Similarly, even if *Richardson* is construed to establish an independent basis for admiralty jurisdiction, it too is subject to the "nexus" requirement outlined in *Executive Jet*.

In *Lewis Charters v. Huckins Yacht*, 871 F.2d 1046 (11th Cir. 1989), the Eleventh Circuit ruled that a claim which does not bear a significant relationship to traditional maritime activity is not otherwise cognizable in admiralty court under the Limitation of Liability Act. Responding to the argument that *Richardson* permitted an independent basis of admiralty jurisdiction under the Limitation of Liability Act, the Eleventh Circuit noted that "*Richardson* was decided before the Supreme Court explicitly included a nexus requirement in the test for admiralty jurisdiction . . . " *Lewis Charters*, 871 F.2d at 1052. Focusing upon the *Richardson* court's reliance on congressional intent, the Eleventh Circuit concluded that "[t]he reasons for the Supreme Court's liberal construction in 1911 no longer exist today." *Id.* at 1053. Therefore, the court reasoned, "appellant may not base admiralty jurisdiction solely upon the Limitation Act, in the absence of a significant relationship between its claim and traditional notions of

maritime activity." *Id.* at 1054. Since the fire which started in the washer/dryer unit aboard Petitioner's yacht does not bear a significant relationship to traditional maritime activities, Petitioner's claim lacks admiralty jurisdiction, even if premised upon the Limitation of Liability Act.

Finally, if *Richardson* is interpreted as developing a separate, distinct "species" of federal admiralty jurisdiction, then it should be reconsidered in light of the changes in our society since 1911. Congress enacted the Act to encourage investment in the shipping industry in the United States and prevent investment capital from being diverted to England. Petitioner argues that the same policy applies today. This is nonsense. With millions of pleasure craft on all of the various bodies of water in this country, manufacturers of pleasure boats are neither encouraged nor discouraged by this Act. Indeed, how can a manufacturer of boats know in advance whether his product will be used on navigable or non-navigable waters? There is no improvement in this nation's boat manufacturing capacity due to the Limitation of Liability Act and no public policy supporting its application beyond traditional maritime activities.

Expanding the protection afforded under the Act to include non-maritime, non-commercial torts serves no purpose and accomplishes nothing but injustice. Many district courts have simply refused to apply the Act to pleasure craft. *Baldassano v. Larsen*, 580 F. Supp. 415 (D.Minn. 1984); *Complaint of Tracey*, 608 F. Supp. 263 (D.Minn. 1985); *Matter of Lowing*, 635 F. Supp. 520 (W.D. Mich. 1986). We merely recommend that this Court declare that jurisdiction under the Act is co-extensive with general admiralty jurisdiction.

CONCLUSION

Respondent respectfully requests that this Court affirm the Seventh Circuit's decision in *In Re: Sisson*, which dismissed Sisson's suit for lack of subject matter jurisdiction. Respondent requests that this Court find that jurisdiction under the Limitation of Liability Act is co-extensive with general admiralty jurisdiction and, therefore, subject to the *Executive Jet* "nexus" test, as further defined in *Sisson*. Respondent further requests that this Court reconsider its decision in *Richardson v. Harmon*, restricting its application to instances of maritime torts damaging non-maritime structures or, in the alternative, declaring that the *Richardson* case is outdated and must be amended in light of our society's proliferation of pleasure craft involved in "garden variety" tort claims which are not properly brought in federal court under the Limitation of Liability Act.

Respectfully submitted,

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No. 88-2041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF:
The Complaint of EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,
Petitioner,

v.

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

REPLY BRIEF ON THE MERITS BY PETITIONER EVERETT A. SISSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 88-2041

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REPLY BRIEF ON THE MERITS BY PETITIONER EVERETT A. SISSON

I.

THIS COURT'S DECISION IN *RICHARDSON v. HARMON* IS CONSISTENT WITH ALL PREVIOUS AND SUBSEQUENT DECISIONS REGARDING ADMIRALTY AND MARITIME JURISDICTION. TO REVERSE IT NOW WOULD UNJUSTIFIABLY DENY THE OPPORTUNITY FOR LIMITATION IN SITUATIONS INVOLVING NON-MARITIME TORTS.

Amicus United States argues (Am. Brief, 1-17) that *Richardson v. Harmon*, 222 U.S. 96 (1911), represented a significant departure from prior decisions of this Court by holding the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*, applicable to a non-maritime tort, an area beyond the "matters and places to which the maritime law extends." (Am. Brief, 17). We submit that this argument (a) insufficiently appreciates the import of those prior decisions, both individually and as related to one another, and (b) does not adequately take into account that the "limits" of maritime tort jurisdiction were both "territorial" (occurring on navigable waters) and "non-territorial", in the sense that certain occurrences on navigable waters (e.g., death) did not fall within admiralty jurisdiction.

The first important case considering the Limitation Act, *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1872), pointed out:

> . . . the state courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided . . .

Id., at 123-124. The Court, thereafter, prescribed rules to apply to limitation proceedings in the district courts.

In *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886), the owner of a steamer sought to limit its liability for multiple claims arising from a fire caused by sparks from the steamer's smoke stack when the fire occurred on land. The Court examined the Limitation Act in detail (quoting its pertinent sections in full) and concluded that it did not purport to confer any jurisdiction upon a district court (*Id.*, at 617). The Court then reviewed the material Supplementary Rules in Admiralty (quoting them in full), and concluded that nothing in them purported to enlarge the jurisdiction of the district courts as to subject matter (*Id.*, at 623, 624, 625). The Court expressly reserved the question whether the statutory limitation of liability extended to the non-maritime torts, i.e., the fire damages in question (*Id.*, at 625). That is, it refused to hold that, under the language of the original 1851 statute, damage sustained beyond the "territorial limit" of maritime jurisdiction was not subject to shipowner's limitation of liability. The reasonable inference from all of the foregoing is that if the Court has ascertained that the statute or the rules specifically conferred (enlarged) jurisdiction on the district court, it would have held that jurisdiction existed. The formalistic *Phenix* decision seems to have disregarded the *Norwich* Court's conclusion, *supra*, foreclosing the possibility of state court jurisdiction (Am. U.S. Brief, 14, fn. 9). Thus, clearly inconsistently with *Norwich*, *Phenix* effectively (and, we submit, wrongly) denied a shipowner's right to seek limitation for non-maritime torts, although inflicted by a steamer on navigable waters.

In *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527 (1889) the Court again was called upon to interpret the Act of 1851, and it did so by stating that the Act could be applied to limit a claim under a state wrongful death statute arising from the sinking in a navigable water.

However, this Court also left open the question as to the interpretation of the Act, as amended in 1884, and the specific meaning of the language "all debts and liabilities" as found in 46 U.S.C. § 189.

> The language is somewhat vague, it is true; but it is possible that it was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury causes with the privity or knowledge of the owner. But it is unnecessary to decide this point in the present case. The pendency of the proceedings in the limited liability clause was a sufficient answer to the liability of the appellant.

Id. at 554.

Butler emphasized that the law of limited liability is coextensive with the whole territorial domain of the maritime law and is subject to such amendments as Congress may see fit to adopt, within limits which are matters of judicial cognizance, citing *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522 (1862). (*Id.*, at 555, 556-7.) In *St. Lawrence*, at 526-527, the Court adverted to the difficulties it had experienced in not being able to fix such limits with precision.

However, the most significant point in *Butler* was the holding that limitation of liability applied to a death claim that may have arisen under state law, although the general maritime law gave no report of recovery for such a claim. That is, solely by virtue of the limitation statute, the admiralty court was enabled to exercise jurisdiction over a case then considered outside the "non-territorial" limit of the law.

In *In re Garnett*, 141 U.S. 1 (1891) this Court decided that the 1884 amendment, extending jurisdiction to inland waters, was constitutional.

In *The Hamilton*, 207 U.S. 398 (1907), the Court held that by virtue of the limitation statute the shipowner was able to transfer its liability for a death claim not recoverable under general maritime law to the limitation fund and the exclusive jurisdiction of the admiralty court, (*Id.*, at 405-6), another clear instance of going outside the "non-territorial" limit of admiralty jurisdiction.

Amicus United States (Am. Brief, 15-16, fn. 10) makes an extended argument that it was not clear that state wrongful death claims were outside the general maritime jurisdiction. But that is beside the point. *Butler* and *Hamilton* held that death claims, even if non-maritime (then not recoverable under general maritime law) were subject to application of the Limitation Act, and, therefore came within admiralty and maritime jurisdiction in the limitation proceedings.

In *Richardson*, this Court was finally called upon to interpret the language "any and all debts and liabilities" contained in the amendment of 1884, in the context of a non-maritime tort. This Court noted that the *Butler* decision had left that question unanswered, and that the decision in *Ex parte Phenix* related to a liability preceding the 1884 amendment. This Court correctly held that the Limitation of Liability Act ". . . was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not therefore included . . ." (*Id.*, at 105) and would cover all claims arising out of the conduct of the master and crew whether the liability be strictly maritime or for a tort non-maritime. This Court has never departed from this interpretation. See, e.g., *Just v. Chambers*, 312 U.S. 383, 386 (1941); *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 44-45 (1934); *Hartford Acci. & Indem. Co. v. Southern Pac. Co.*, 273 U.S. 207, 217 (1927).

Richardson was, therefore, consistent with *Norwich*, *Butler*, and *Hamilton*, its only novelty being a marginal enlargement of the "*territorial*," rather than the "non-territorial," limit of admiralty jurisdiction in a case involving a vessel on navigable waters.

It is a curious circumstance that *Richardson chiefly* addresses a proposition never made in *Phenix*, namely that the 1851 statute embraced liabilities for only maritime torts. In doing so, *Richardson* concluded that the 1884 amendment expanded the types of liabilities as to which a shipowner could seek limitation. At the same time, *Richardson* paid no heed to *Phenix's* concern with the lack of explicit jurisdictional reference to the district court in the statute or admiralty rules. While this approach seems unusual, we submit that *Richardson* is consistent with *Norwich*, *Butler*, and *Hamilton* in concluding that a shipowner could seek limitation:

> . . . in respect of claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime.

Id., at 106. It is, we submit, *Phenix* that is inconsistent with that line of cases.

Amicus Hatteras argues (Hat. Brief, 10) that the *Richardson* court did not state the case in jurisdictional terms and did not conclude that the Limitation Act provided an independent jurisdictional basis. However, that is precisely what the Court did. In the district court, the owner of the bridge had excepted to the jurisdiction of the court and his exception had been sustained. *Richardson* at 101. This Court disposed of the case in these terms:

> If thus the owner's liability for a tort permitted or incurred through the master or crew, although non-maritime because due to a collision between the ship

> and a structure upon land, be one in respect to which his liability is limited, and he applies for the benefit of such limitation to the proper District Court of the United States, "all proceedings," by the express terms of § 4285, Revised Statutes, "against the owner shall cease." The procedure in any such case is prescribed by the 54th and 66th rules in admiralty, where it is said that the court shall, "on application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims."

Id., at 106. The district court decree sustaining the exception to jurisdiction was reversed.

Thus, in the context of the limitation proceeding, this Court clearly concluded in *Richardson* that there was admiralty jurisdiction over the non-maritime tort claim there involved.[1]

Respondents Amicus argue from the wording of 46 U.S.C. § 185 that the statute's language, ". . . may petition a district court of the United States *of competent jurisdiction* for limitation of liability . . ." (emphasis added), indicates

[1] There is an alternative ground for supporting the result of the *Richardson* decision. The original 1851 statute afforded limitation of liability in very broad terms ". . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner . . ." *Phenix*, *supra*, at 616-17. It is difficult to see that this language excluded non-maritime torts. As we have seen, *supra*, the *Phenix* court declined to so hold. *Butler*, *supra*, at 550, said of this statute, ". . . nothing can be more general or broad than its terms." A leading text has similarly commented. G. Gilmore & C. Black, *The Law of Admiralty*, (2d Ed. 1975) at 666. We submit that, if *Richardson* is thought to need reconsideration, that language of the original 1851 statute should also be addressed.

that jurisdiction must be derived from some other source (United States Brief, 26 fn. 20; Hat. Brief, 7). As to that argument, we would make a number of points. The phrase "of competent jurisdiction" more logically indicates that of the district courts in the United States only one or a few, would be of competent jurisdiction. For example, although, strictly speaking, relating to venue, Rule F(9) of the Supplemental Rules for Certain Admiralty and Maritime Claims requires that the limitation complaint be filed in certain districts depending on such things as whether the vessel has been arrested in the district, the owner sued in the district, etc. If venue is wrongly laid, the court has the option under Rule F(9) of dismissing the complaint, so in that sense venue may well be jurisdictional. In a similar vein, if the shipowner fails to file a limitation complaint within six months of receiving its first written notice of a claim, the court would be without jurisdiction and must dismiss the complaint. *The Maine*, 28 F.Supp. 678 (D. Md. 1939), *aff'd. sub nom. Standard Wholesale P. & A. Works v. Travelers Ins. Co.*, 107 F.2d 373 (4 Cir. 1939), the court stating ". . . where a condition precedent to a right to invoke the benefits of the statute has not been met, the admiralty court is without jurisdiction . . ." (*Id.*, at 582). Moreover, we submit that if Congress had wished to exclude non-maritime tort claims from application of the limitation of liability statutes, it would have done so explicitly, rather than by ambiguous implication. This is particularly true because at the time the statute was amended (1936) *Richardson* had been the law for some 25 years.

Clearly, in *Richardson* this Court was doing nothing more than interpreting, for the first time, the clear and unambiguous language of the Limitation of Liability Act, as amended in 1884. This conclusion is supported by the

fact that, two weeks after that decision, this Court rendered its decision in *Martin v. West*, 222 U.S. 191 (1911). *Martin* involved almost the identical fact pattern presented in *Richardson* with the exception that, in *Martin*, the railroad had instituted suit against the vessel owner pursuant to admiralty and maritime jurisdiction for injuries done to its shoreside property. *Martin* did not involve the Limitation of Liability Act as the case was brought within the general maritime jurisdiction of this Court. There, this Court held that the maritime jurisdiction of the federal courts did not extend to cover losses occurring on land, even if the cause of the loss originated on a navigable waterway.

Reading *Richardson* and *Martin* together, it is clear that, but for the all inclusive language of the Limitation of Liability Act as amended in 1884, there would be no general admiralty jurisdiction to cover non-maritime torts. *Richardson* must be read as a case which interpreted the specific language of the Limitation of Liability Act. *Richardson* and *Martin* created a one-way jurisdictional channel.

Both the Respondents and the United States have chosen to totally ignore this Court's decision in *Martin v. West*, and have treated *Richardson* as if it existed in a vacuum unconnected with prior and subsequent decisions. Without discussing the significance of *Martin* it is impossible to fully understand the significance of the decision in *Richardson*, and results in the wrong conclusion.

Moreover, the omission of a discussion of *Martin v. West* could lead to the conclusion that the Extension of Admiralty Jurisdiction Act 46 U.S.C. § 740 was enacted in 1948 to cover the injuries involved in the *Richardson* case. However, this Court has recognized that the Extension

of Admiralty Jurisdiction Act was passed, in part, to remedy the inequities of cases such as *Martin v. West*. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209 and n. 8 (1971), *reh. den. Victory Carriers, Inc. v. Law*, 404 U.S. 1064 (1972), and *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 260 (1972).

The Extension Act, was enacted, in part, to afford shoreside interests the same opportunity to bring suits in admiralty as was available to vessel owners under the Limitation Act. The Extension Act harmonized the availability of admiralty jurisdiction for all parties beyond the traditional scope of admiralty tort jurisdiction. We now have a two-way channel for jurisdiction. To reconsider *Richardson*, may recreate a one-way channel in the opposite direction.

Finally, to argue that the Limitation of Liability Act derives its jurisdiction from the general maritime law ignores the historical fact that Congress enacted the original Act to provide a rule which "had never been adopted in this country, until it was enacted by statute." *In re Garnett, supra* at 13.

> But while the rule adopted by congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute and not upon any inherent force of the maritime law.

The Scotland, 105 U.S. 24, 29 (1882).

The Act cannot logically be interpreted to be limited by the very law it was intended to enlarge.

II.

THE INTERPRETATION OF *RICHARDSON v. HARMON* SUGGESTED BY THE RESPONDENTS AND THE UNITED STATES WILL UPSET THE LEGISLATIVE INTENT OF CONGRESS.

This Court has long recognized that Congress has the power to extend admiralty jurisdiction. Congress has chosen to do so in the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 and in the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.* as interpreted by *Richardson*. The intent of Congress in extending admiralty jurisdiction in those two acts should not be altered or restricted in any manner inconsistent with the statutory language. The reasoning of the Respondents and the United States would result in such a restriction.

The Extension of Admiralty Jurisdiction Act has extended admiralty jurisdiction "to and include all cases of damage or injury to person or property caused by a vessel on a navigable water". The only requirements for admiralty jurisdiction pursuant to this statute are that there be an injury to person or property caused by a vessel on a navigable water. Congress did not require that there be a nexus to a "traditional maritime activity". There is no support under the plain language of the statute to suggest that "traditional maritime activity" be a requirement for maritime jurisdiction under the Act.

The Limitation of Liability Act provides the owner of a vessel with the opportunity to limit his liability for "any or all debts and liabilities". The only requirements under the Act are that there be a vessel and the liabilities must exceed the value of the owner's interest in the vessel. There is no requirement in the statutory scheme for the nexus to a "traditional maritime activity". The Act would

be available to cover "all debts and liabilities" such as liens, property claims, personal injuries, salvage expenses, and any other liability which may arise. Requiring that there be a nexus to a "traditional maritime activity" would restrict the broad application of the Act and defeat the protection afforded to vessel owners by Congress.

III.

LIMITATION OF LIABILITY AND ADMIRALTY JURISDICTION FOR PLEASURE CRAFT DO HAVE A COMMERCIAL NEXUS, ALTHOUGH NONE IS REQUIRED.

Respondents argue that pleasure craft claims are nothing more than a "garden variety" state court tort that will clog the federal courts and severely curtail access to state courts. Petitioner believes this argument is not well-founded.

While it is true that the number of pleasure craft have increased manyfold, they have produced only very few cases in the federal court system. Most of the reported yacht cases dealing with jurisdiction have been cited in the various briefs, and do not number more than a couple of dozen cases. Like cargo claims, the vast majority of yacht claims are relatively small and are resolved outside of litigation or in the state court system.

The argument that a weekend sailor may limit his liability, "when his negligence causes personal injury or property damage" (Resp. Brief, 13) is without merit. A plain reading of the statute shows that if the owner of the boat is negligent, he may not limit. The Limitation of Liability Act provides for a concursus to bring all claims into one forum, and then requires the owner of the vessel to affirmatively establish his lack of privity and knowledge of the proximate cause of the accident. If the owner is

operating the vessel at the time of the accident, or is otherwise responsible by his own acts for the proximate cause of the accident, he most likely will not be able to limit. It is not unlike the owner of an automobile who lends it to another, and it is involved in an accident. The owner of the car is not responsible unless the plaintiff could establish that the owner negligently entrusted the car to the driver. If, however, the owner of the car is operating it at the time of the accident, or had negligently repaired the car, the owner may be found liable.

Citing examples of rowboats and personal floatation devices does not relate to the true nature of the dispute before this Court. At 54 feet, the M/V ULTORIAN is the size of many vessels such as tugs, supply boats, and sightseeing boats. As Respondents' own statistics show, pleasure craft have become big business. They are built in United States' yards and oversees; they are bought and sold throughout the country; they are insured, serviced, maintained and docked; they literally move in the streams of commerce; and, most importantly, they carry people. They are a means of transport on the water. The owner of a boat, often referred to as a hole in the water into which one pours all of his money, spends money to be transported on the water, just as the passenger does on the sight-seeing boat or cruise ship. Recreation is big business in this country, and no less important to the economy, and its commercial interests, than cargo moving on the water. Do we really have commerce here after all? Does it matter? Many vessels today never existed when the admiralty tort jurisdiction was first defined, and the Court should not wrap jurisdiction up in the canvas shroud of sailing ships past.

Most of the arguments of Respondents basically say that limitation of liability is bad, and that being in federal court

will somehow deprive Respondents of their state court remedies. It is interesting to note that following the dismissal of this action by the district court, the Respondents filed a new action in federal court on the diversity side, alleging basically the same arguments found in their claim in limitation.

The only real issue present in this case is Respondents' desire to avoid the "possible" results of a limitation of liability proceeding. The arguments on admiralty jurisdiction are designed to reduce or restrict admiralty jurisdiction, even though it has been expanded by Congress in the Limitation of Liability Act and the Extension of Admiralty Jurisdiction Act. While many commentators and courts have criticized the Limitation of Liability Act, it nonetheless remains the law. The Act covers *all* liabilities for seagoing vessels and to all vessels used on lakes, rivers or inland navigation. The statute should be given the plain meaning of its words, not a restricted Orwellian meaning. "All" means all.

It is submitted that the Extension of Admiralty Jurisdiction Act properly codifies the basis for general admiralty jurisdiction.

IV.

THE SISSON TEST FOR ADMIRALTY TORT JURISDICTION IS IN CONFORMANCE WITH THE EXTENSION OF ADMIRALTY JURISDICTION ACT AND THE LIMITATION OF LIABILITY ACT.

The Petitioner's test for general admiralty jurisdiction is simple and consistent. It respects legislative intent and the historic development of admiralty jurisdiction. It reconciles the general admiralty law with Limitation of Liability, the Extension Act, *Richardson v. Harmon*, *Martin v. West*, *Executive Jet*, and *Foremost Insurance Co. v.*

Richardson, 457 U.S. 668, *reh. den. Foremost Ins. Co. v. Richardson*, 459 U.S. 899 (1982). It simply requires a vessel, as commonly understood, or as described in the statutes, and a navigable water. This test answers the problem found in *Executive Jet Aviation*, *supra*, and eliminates the nexus problem that has so plagued the courts. The *Executive Jet* airplane is not a vessel, unless it is a seaplane operating on the water as a vessel, and, therefore, it is not subject to admiralty jurisdiction. Congress may, of course, turn a duck into a swan, as it did on the Death on the High Seas Act applying to aircraft, and that legislative prerogative was specifically recognized in *Executive Jet*.

It is submitted that the Extension Act, passed in 1948, merely codified the commonly accepted approach to admiralty jurisdiction when it required a vessel on a navigable waterway. While it has been interpreted to have been passed to correct the inequities found in *Martin v. West*, the plain reading of the statute extends the admiralty jurisdiction to *all* vessels in navigable waters. The phrase "notwithstanding that such damage or injury be done or consummated on land" should not be read to restrict the Extension Act to just those situations. The Act defines admiralty jurisdiction and clarifies that it even extends to damage or injury on the land. No nexus is referred to or implied, nor should this Court graft on such a limitation.

Furthermore, if it is argued that limitation of liability is not available unless the claimant could file in admiralty, then the Extension Act settles the question once and for all. In this case, the other yachts could have claimed in admiralty under the general admiralty jurisdiction, and the Port Authority could claim under the Extension Act. Therefore, the owner of the M/V ULTORIAN should be entitled to seek limitation.

It is, therefore, submitted that *Richardson v. Harmon* should not be reconsidered, that admiralty tort jurisdiction should be based on the presence of a vessel on the navigable waterway, and that both the Limitation of Liability Act and the Extension Act provide a separate basis for jurisdiction. This will require a change in the nexus requirement first outlined in *Executive Jet* and *Foremost*, that has caused so much confusion and judicial scrutiny. Congress has eliminated the confusion by focusing on a vessel and navigable water. The Sisson test is not the old situs test, which would have given jurisdiction in *Executive Jet*, but a test that meets the needs of maritime jurisdiction and the requirements of Congress.

CONCLUSION

In summary, there is admiralty jurisdiction for the M/V ULTORIAN under all jurisdictional approaches.

1. General Admiralty Tort Jurisdiction
   a. The M/V ULTORIAN is a vessel.
   b. The M/V ULTORIAN was on a navigable waterway.
   c. A nexus should not be required, but if one is, the M/V ULTORIAN was interactive with commerce, docking is a maritime operation as well as maintenance and cleaning. and limitation of liability is a matter of federal admiralty concern.
2. The Limitation of Liability Act
   a. The M/V ULTORIAN is a vessel.
   b. The M/V ULTORIAN was on the water.
   c. The Act provides for an independent basis for jurisdiction.
   d. No nexus is required.
   e. The Act covers all liabilities.

3. Extension of Admiralty Jurisdiction Act
   a. M/V ULTORIAN is a vessel.
   b. M/V ULTORIAN was on a navigable waterway.
   c. Property damage to floating vessels and floating dock.
   d. No nexus is required.

The Petitioner urges this Court to reject the restrictive interpretation of *Foremost* by the Seventh Circuit Court of Appeals and reverse its opinion. The grant of admiralty and maritime jurisdiction should be broadly construed so as to include torts or wrongs occurring on navigable waterways involving watercraft or artificial contrivances which are used or capable of being used for transportation on water. Only in this fashion will there be a uniform maritime law applicable to all vessels whether operating in commerce or for pleasure.

The Petitioner also urges this Court to uphold the majority view and find that the Limitation of Liability Act is available to recreational craft and provides a separate and independent basis for admiralty jurisdiction. In this regard, *Richardson v. Harmon* should not be reconsidered, but viewed as a correct interpretation of the statutory language in the amendment to the Limitation of Liability Act to include all liabilities of "all vessels". *Richardson* also found that the Limitation of Liability Act afforded a separate and independent basis for jurisdiction.

Respectfully submitted,

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No. 88-2041

In the Supreme Court of the United States

OCTOBER TERM, 1989

EVERETT A. SISSON, PETITIONER

v.

BURTON B. RUBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Limitation of Liability Act applies to state-created liabilities arising out of torts having no significant relationship to traditional maritime activity.

2. Whether, in determining the applicability of the Limitation of Liability Act, this Court should reconsider its decision in *Richardson* v. *Harmon*, 222 U.S. 96 (1911).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules: Page

Miscellaneous:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

The United States is frequently involved in proceedings arising from the Limitation of Liability Act. The United States is entitled to the benefit of the Act if it is sued as an owner of a vessel. 46 U.S.C. App. 746, 789 (Supp. IV 1986). See *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 690-691 (1927). The United States may also assert claims as to which a vessel owner seeks to invoke the Act. *E.g., States Steamship Co.* v. *United States*, 259 F.2d 458 (9th Cir. 1958). Finally, the United States may be a co-defendant with a vessel owner who seeks to limit liability under the Act; in such a case, the amount of the government's liability to a third party may turn on whether the vessel owner may limit his liability. Cf. *Republic of France* v. *United States*, 290 F.2d 395 (5th Cir. 1961). The United States has been involved in litigation in which the owner of a

recreational vessel has sought to limit liability. See *Carpenter* v. *United States*, 710 F. Supp. 747 (D. Nev. 1988).

In connection with the Court's consideration of the petition, the Solicitor General was invited to and did file a brief expressing the views of the United States.

STATEMENT

1. Originally enacted in 1851, the Limitation of Liability Act, 46 U.S.C. App. 181 *et seq.*, provides that "[t]he liability of the owner of any vessel" for "any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[1] An owner who wishes to enforce his rights under the Act "may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions" of the Act. 46 U.S.C. App. 185.[2] In addition to filing a complaint under the Act, the owner must either deposit with the court a sum equal to the value of the vessel and pending freight or transfer his interest in those assets to a trustee. *Ibid.*; see Fed. R. Civ. P. Supp. F(1).

When an owner has complied with these requirements, "all claims and proceedings against the owner or the

[1] 46 U.S.C. App. 183. Unless otherwise noted, all citations to the Appendix to Title 46 of the United States Code are to Supplement IV (1986) of the Code.

[2] Federal jurisdiction over such a proceeding is exclusive. See *Providence & New York S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 594-595 (1883). This Court established the procedures for limitation proceedings when, in connection with its decision in *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) 104 (1871), it issued "Supplementary Rules of Practice in Admiralty." The same basic procedures—albeit with some modifications reflecting amendments to the statute and the unification in 1966 of the law and admiralty "sides" of the district courts—have been carried forward in Supplemental Rule F of the Federal Rules of Civil Procedure.

owner's property with respect to the matter in question" are stayed Fed. R. Civ. P. Supp. F(3); see 46 U.S.C. App. 185. Upon application by the owner, the district court in which the limitation proceeding has been commenced is empowered to "enjoin the further prosecution of any action or proceeding against the [owner] or the [owner's] property with respect to any claim subject to limitation in the action." Fed. R. Civ. P. Supp. F(3).

When a complaint has been filed under the Act, the district court issues a notice to "all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims [in that court]." Fed. R. Civ. P. Supp. F(4). In the classic limitation of liability situation, in which there are multiple claims against the owner and the total amount sought exceeds the value of his interest in the vessel, the district court is empowered to adjudicate all questions presented by the Act and the underlying claims. That court has jurisdiction to determine whether the owner is entitled to the statutory limitation of liability—an issue that often turns on whether the casualty was within his "privity or knowledge" and whether and in what amount the owner is liable to each claimant. See G. Gilmore & C. Black, *The Law of Admiralty* § 10-17 (2d ed. 1975). If the owner establishes his entitlement to the benefits of the Act, the court apportions the value of the vessel and pending freight among the successful claimants.[3]

[3] The Act has been construed to preserve the claimants' choice of forum for their claims in some circumstances. In cases in which there is only a single claimant or it has been established that the total value of the claims against the owner does not exceed the value of the vessel and pending freight, claimants are generally allowed to adjudicate the owner's liability in the courts in which they commenced their actions against the owner. See *Langnes* v. *Green*, 282 U.S. 531 (1931); *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147 (1957). If the district court determines that the vessel owner is not entitled to limitation, it retains jurisdiction to hear the merits of the underlying claims. *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207 (1927). However, the claimants are ordinarily

The Limitation of Liability Act does not itself confer jurisdiction on the federal courts. However, in *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) 104 (1871), this Court held that the grant of admiralty and maritime jurisdiction to the district courts, 28 U.S.C. 1333, empowers those courts to entertain proceedings under the Act. The courts' jurisdiction to conduct proceedings under the Act is as broad as, but no broader than, the liabilities that are subject to limitation.

One of the questions in this case is whether and to what extent those liabilities include state-law liabilities arising from torts that would not otherwise be within the admiralty and maritime jurisdiction of the federal courts. In 1886, in *Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886), this Court held that a federal district court lacked jurisdiction to limit an owner's liability for non-maritime torts—*i.e.*, those torts giving rise to claims that, apart from the Limitation of Liability Act, would not fall within the court's admiralty and maritime jurisdiction. Twenty-five years later, however, in *Richardson* v. *Harmon*, 222 U.S. 96, 106 (1911), the Court held that an 1884 amendment to the Limitation of Liability Act (now codified at 46 U.S.C. App. 189) extended the statute to "all claims * * * whether the liability be strictly maritime or from a tort non-maritime." Thus, the Court concluded, the Act and the federal courts' jurisdiction to administer it were not restricted to torts that would otherwise be subject to adjudication in admiralty.

This case again presents the issue addressed in *Ex parte Phenix* and *Richardson*, albeit in an altered setting. In the decades since *Richardson*, there have been significant developments in the scope of federal admiralty jurisdiction. With the enactment in 1948 of the Exten-

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entitled to resume their actions, if they choose. *In re Wood*, 230 F.2d 197 (2d Cir. 1956).

The Limitation of Liability Act may also be pleaded as a defense to an action to recover against the shipowner. See *The "Scotland"*, 105 U.S. 24, 34-35 (1881).

sion of Admiralty Jurisdiction Act, 46 U.S.C. App. 740, Congress has enlarged the territorial scope of that jurisdiction to encompass formerly non-maritime torts of the type specifically at issue in *Ex parte Phenix* and *Richardson*—*i.e.*, injuries by vessels on navigable waters to persons or property on land. In *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), and *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668 (1982), this Court established that a wrong occurring on navigable waters must also have a significant relationship to traditional maritime activity in order to qualify as a maritime tort within the admiralty jurisdiction. In light of these developments, the Court is again called upon to consider whether standards governing the availability of federal admiralty jurisdiction over claims arising in tort are also applicable in determining the scope of the Limitation of Liability Act.

2. Petitioner Everett A. Sisson was the owner of the Ultorian, a 56-foot pleasure yacht. On September 24, 1985, the Ultorian caught fire while docked at the Washington Park Marina in Michigan City, Indiana. The yacht was destroyed, and the fire caused extensive damage to the marina and to other vessels in the vicinity. The owners of the marina and the damaged vessels estimate that their losses exceed $275,000. Pet. App. 1a-2a, 25a.

Petitioner commenced this action in federal district court to obtain the benefits of the Limitation of Liability Act. Alleging that the fire had occurred without petitioner's privity or knowledge, the complaint sought a judgment enjoining the pursuit of claims against petitioner for damages arising from the fire, adjudicating petitioner's liability on those claims, limiting petitioner's total liability to the value of his interest in the Ultorian after the casualty (approximately $800), and dividing that sum among any successful claimants. The complaint invoked the admiralty and maritime jurisdiction of the United States. Compl. ¶¶ 8, 10, 13, prayer.

The district court dismissed the complaint for lack of subject matter jurisdiction, and the court of appeals affirmed. The court of appeals first held that the casualty involved in this case—a fire that began in the Ultorian's washer/dryer—did not have the "significant relationship to traditional maritime activity" required under *Executive Jet* and *Foremost* for the exercise of admiralty jurisdiction. Pet. App. 2a-14a.[4]

The court also held that the Limitation of Liability Act did not provide an independent basis of federal jurisdiction. The panel acknowledged that *Richardson* had allowed recovery for non-maritime torts, but questioned the continuing applicability of that case. Pet. App. 16a. In its view, the Extension of Admiralty Jurisdiction Act "eliminate[d] the need and reason for [*Richardson*]," *ibid.* Moreover, the court observed, to uphold admiralty jurisdiction in this case "would be contrary to the policy of *Executive Jet* and *Foremost*," *id.* at 18a. "[W]hen a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing the Limitation of Liability Act—which provides for a practice apparently defensible only in a traditional maritime context—to provide an independent basis for admiralty jurisdiction." *Ibid.*

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[4] The court of appeals interpreted this Court's decisions as confining the admiralty jurisdiction in tort cases "either to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially 'disruptive impact' on maritime commerce and (2) involves the 'traditional maritime activity' of navigation." Pet. App. 8a. In the court's view, the present case, which involved a fire at a marina for recreational vessels, did not satisfy that jurisdictional test.

Our brief does not address the question of the correctness of this holding by the court below.

SUMMARY OF ARGUMENT

The provisions of the Limitation of Liability Act that define its scope are phrased in very broad terms. A section of the Act originally enacted in 1851 limits a vessel owner's liability for "any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture" to the amount or value of the owner's interest in the vessel. 46 U.S.C. App. 183. In 1884, Congress provided that an owner's liability would not exceed the proportion of "any or all debts and liabilities" that his share of the vessel bears to the whole. 46 U.S.C. App. 189.

Richardson suggests that the language of the second of these enactments—"any or all debts and liabilities"—should be applied literally, so as to encompass liabilities arising from all maritime and non-maritime torts. Thus, under this rationale, the Act would apply to the facts in this case even if this Court determined that it involved only a non-maritime tort. We believe, however, that *Richardson* should be reconsidered and that the statute should be construed to be coterminous with the remainder of the system of maritime law of which it is a part. In view of its history and the niche that it occupies in federal law, the Limitation of Liability Act is most plausibly construed as incorporating established limits on the system of admiralty and maritime law.

A. From its inception, the Limitation of Liability Act has been understood as a statutory addition to the system of admiralty and maritime law that is implicit in Article III's extension of the federal judicial power to "all Cases of admiralty and maritime Jurisdiction." In its earliest decisions construing the Act, this Court recognized that the principle of limited liability had originated in the maritime codes of European nations, and the Court referred to that body of preexisting law in resolving a number of issues presented by the Act. The Court also held that federal courts, sitting in admiralty, would be principally responsible for administering the Act.

When in the 19th century the Act's constitutionality was challenged on the ground that it exceeded Congress's authority under then-prevailing conceptions of the Commerce Clause, the statute was sustained as an exercise of Congress's authority, inherent in Article III, to modify maritime law. Not surprisingly, therefore, this Court held initially that the Act had the same scope as the pre-existing system of maritime law to which the principle of limited liability had been added.

B. *Richardson* departed from this settled understanding of the relationship between the Limitation of Liability Act and federal maritime law. It construed the Act, as amended in 1884, to extend the statutory principle of limited liability, and with it the admiralty jurisdiction of the federal courts in limitation proceedings, to all liabilities that might be imposed upon a vessel owner, whether or not those liabilities would otherwise have been cognizable in admiralty. Although Congress has constitutional authority to modify maritime law (and thereby to expand to some degree the admiralty jurisdiction of the federal courts), we question whether the 1884 enactment can fairly be construed to effect the very substantial extension of admiralty jurisdiction that *Richardson* attributed to it. The language and legislative history of the statute suggest no such sharp break from the pre-existing understanding.

C. In practice, decisions since *Richardson* have not applied the Limitation of Liability Act to "any or all debts and liabilities" that vessel owners may incur. Lower federal courts have repeatedly declined, we believe correctly, to limit liabilities with respect to casualties on non-navigable waters to which maritime law does not apply. Those courts have recognized that literal adherence to *Richardson's* interpretation of the Limitation of Liability Act is inappropriate—and that some link must exist between that Act and the traditional concerns of maritime law. It is fair to reconsider, therefore, whether the Act is best understood to incorporate established limits on maritime tort law rather than to embody its own,

heretofore unarticulated, standards for determining the liabilities subject to limitation.

D. Developments in the law of admiralty have undercut the basis for *Richardson's* holding. At the time of that decision, restricting the Limitation of Liability Act to maritime torts would have exposed shipowners to unlimited liability for a large class of torts that were then considered non-maritime—those involving injuries to persons and property on land—that would foreseeably arise from accidents on navigable waters. Since *Richardson*, however, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. App. 740, has extended federal admiralty and maritime jurisdiction to encompass those accidents. In addition, the Court's recent decisions have stressed that the boundaries of federal admiralty jurisdiction should reflect the need for uniform federal admiralty law, but should also avoid unnecessary encroachment on state law. The requirement that a tort bear some nexus to traditional maritime activity reflects that concern. These developments call into serious question any rule that the owner of a vessel may invoke federal law to limit his liability for a "non-maritime" tort—a term now understood to embrace tortious conduct that lacks any "significant relationship to traditional maritime activity."

ARGUMENT

THE LIMITATION OF LIABILITY ACT SHOULD BE CONSTRUED NOT TO ENCOMPASS STATE-CREATED LIABILITIES ARISING FROM TORTS THAT LACK A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY

A. Until *Richardson*, The Limitation Of Liability Act Was Understood To Be Coextensive With The System Of Admiralty And Maritime Law Of Which It Was A Part

The Limitation of Liability Act of 1851 defined the liabilities subject to limitation only in the most general terms. On this and other points, the Act was only an outline that "laid down a few general principles and propositions, and left it to the courts to enforce them and carry them into practical effect." *Providence & New York S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 590 (1883).[5] In its early decisions interpreting this broadly

[5] The Act was passed with no debate in the House and less than a day's discussion in the Senate. See Cong. Globe, 31st Cong., 2d Sess. 713-720, 738, 776-777 (1851). See also H.R. Rep. No. 33, 31st Cong., 1st Sess. (1850) (reporting a similar bill during the previous session). Discussion of the bill on the floor of the Senate suggests that its purpose was to place American commercial shipping on an equal footing with English and other foreign competition. Senator Davis explained (Cong. Globe, 31st Cong., 2d Sess. 714 (1851):

> I will only say, that [the proposed legislation] is the adoption of a system which has been several years in operation in England, with certain alterations merely, as I understand it, to adapt it to the affairs of this country, and nothing more. It is simply placing our mercantile marine upon the same footing as that of Great Britain. We are carriers side by side with that nation, in competition with them, and we cannot afford very well to give them any great advantage over us without affecting our interest very seriously.

Accord, *e.g.*, *id.* at 715 (remarks of Sen. Hamlin), 716-717 (remarks of Sen. Rantoul). See also H.R. Rep. No. 33, *supra*.

Notwithstanding the emphasis on the English origins of the legislation, this Court subsequently construed it to differ from the

phrased statute, this Court relied heavily upon the Act's antecedents in the maritime laws of foreign nations, placed the Act squarely within our system of federal maritime law, and ultimately tied the scope of the Act to the boundaries of that system.

The first major case involving the Act was *Norwich Co.* v. *Wright*, *supra*; that case presented the questions whether the Act applied to damages arising from collisions, whether the owner's interest in a vessel was to be measured before or after the casualty, and what judicial proceedings were appropriate to enforce an owner's rights under the Act. After tracing the history of limited liability in the maritime codes of continental European nations and similar English statutes, 80 U.S. (13 Wall.) at 116-120,[6] the Court held that the Act followed the "general maritime law" in applying the concept of limited liability to all damages—not just damages for injury to cargo—arising from a collision. *Id.* at 121. Similarly, the Court held that the Act "adopt[ed] the rule of that [maritime] code" that an owner's interest in a vessel was to be valued after the event giving rise to the owner's liability. *Id.* at 127.[7]

In keeping with the Act's origins in the maritime codes of foreign nations, the Court also assigned responsibility for its implementation to federal admiralty courts. The Court explained (80 U.S. (13 Wall.) at 123-124 (emphasis omitted)):

English model in several respects. See *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) 104, 124, 127 (1871); *The "Benefactor"*, 103 U.S. 239, 243, 246-247 (1880); *Providence & New York S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578, 597 (1883).

[6] See also *The Main* v. *Williams*, 152 U.S. 122, 126-128 (1894); *The "Scotland"*, 105 U.S. 24, 28-29 (1881).

[7] In England, a shipowner had been required to post the value of the vessel and freights as of the time of a casualty—*i.e.*, before it was damaged. The adoption of the rule of the European maritime codes meant that the owner's liability—as this case reflects—would often be limited to the value of a vessel that had been sunk, lost, or severely damaged. See *The "Benefactor"*, 103 U.S. 239, 246-247 (1880); *The City of Norwich*, 118 U.S. 468, 490-493 (1886).

> The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take "the appropriate proceedings in any court, for the purpose of apportioning the sum for which, &c." Now, no court is better adapted than a court of admiralty to administer precisely such relief. * * * Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter * * *.

The Court issued Supplementary Rules of Practice in Admiralty to detail procedures to be followed in such cases. See G. Gilmore & C. Black, *supra*, § 10-14.

In later cases, the Court emphasized not only that the Act had been patterned after maritime law abroad, but also that it should be understood as a statutory addition to the system of federal maritime law implicit in Article III's extension of judicial power to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2.[8] For instance, in *The "Scotland"*, 105 U.S. 24, 29, 30

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[8] This provision is now understood to encompass three grants of constitutional authority (*Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959)):

> (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," * * * and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.

This conception of the grant of admiralty jurisdiction in Article III was firmly established when the Court was determining the place of the Limitation of Liability Act in federal law. See *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572-578 (1875).

(1881), a case involving the Act's applicability to foreign vessels, the Court outlined the sources of federal maritime law and found that the Act "declares the rule which the law-making power of this country regards as most just to be applied in maritime cases."

In *Providence & New York S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578 (1883), the Court upheld federal authority to stay state court proceedings in deference to a pending federal proceeding to limit a vessel owner's liability. The Court reasoned that the Act was a legitimate exercise of Congress's "power to make changes in the maritime law of the country," *id.* at 589; that the statutory principle of limited liability was a subject "preeminently of admiralty jurisdiction" since it was "nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial," *id.* at 593; and that even "if this were not so, the subject-matter itself is one that belongs to the department of maritime law." *Id.* at 593-594. Based upon this understanding of the Act, the Court concluded that a federal district court "has full jurisdiction and plenary power, as a court of admiralty, to entertain and carry on all proper proceedings for due execution of the law, in all its parts; and its decrees, in cases subject to its jurisdiction, are valid and binding in all courts and places." *Id.* at 599.

Having characterized the Limitation of Liability Act as a statutory addition to the Nation's system of maritime law, administered by federal admiralty courts, the Court next concluded, not surprisingly, that the Act was coextensive with the territorial limits of the admiralty jurisdiction. In *Ex parte Phenix*, *supra*, the owner of a

steamer sought to limit its liability for multiple claims arising from a fire caused by sparks from the steamer's smokestack. Because the fire occurred on land, claims for resulting damages fell outside federal admiralty jurisdiction as then defined. 118 U.S. at 618-619. See *The Plymouth*, 70 U.S. (3 Wall.) 20, 35 (1865). The Court noted that the Act "[did] not purport to confer any jurisdiction upon a District Court" and referred only to "any court of competent jurisdiction," "leaving the question of such competency to depend on other provisions of law." 118 U.S. at 617. It held, accordingly, that neither the Act nor the Supplementary Admiralty Rules extended the admiralty jurisdiction of the district courts to a proceeding to limit a vessel owner's liability for a non-maritime tort. The Court added that nothing in its earlier decisions "support[ed] the view that a District Court can take jurisdiction in admiralty of a petition for a limitation of liability where it would not have had cognizance in admiralty originally of the cause of action involved." *Id.* at 624.[9]

In *Butler* v. *Boston & Savannah Steamship Co.*, 130 U.S. 527 (1889), the Court held that the Act could

[9] As amicus Maritime Law Association notes (MLA Br. 13), the Court stopped short of a square holding that the Limitation of Liability Act had no possible application to non-maritime torts, as it reserved the question "whether or not the statutory limitation of liability extends to the damages sustained by the fire in question, so as to be enforceable in an appropriate court of competent jurisdiction." 118 U.S. at 625. However, that reservation was inconsistent with cases decided before and after *Ex parte Phenix*. In *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) at 123, the Court had foreclosed the possibility of state court jurisdiction, saying that "State courts have not the requisite jurisdiction" to administer the Act. In *Richardson*, moreover, this Court understood *Ex parte Phenix* to have held that non-maritime liabilities were beyond the bounds of the Limitation of Liability Act prior to the 1884 enactment. The Court observed that the original Act "embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts," 222 U.S. at 103, and it construed the 1884 Act as having enlarged the category of liabilities subject to the Act, not as having filled a jurisdictional gap.

properly be applied to limit a claim under a state wrongful death statute arising from a sinking in navigable waters near Martha's Vineyard. After reiterating that Congress had authority to amend and modify maritime law "within these boundaries and limits" of the admiralty and maritime jurisdiction, the Court continued (*id.* at 557):

> It being clear, then, that the law of limited liability of shipowners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends—on the sea and the great inland lakes, and the navigable waters connecting therewith.

Since the sinking in *Butler* occurred in navigable waters, the Court concluded, the state's wrongful death remedy could not "prevent the full operation of the maritime law on those waters" and the state-created liability was subject to limitation. *Ibid.*[10]

[10] *Butler* reserved the question whether state law could create a remedy enforceable in admiralty for injuries incurred on navigable waters. 130 U.S. at 558. This Court subsequently eliminated that doubt, in two steps, in favor of recognition of such remedies in admiralty. First, in *The Hamilton*, 207 U.S. 398 (1907), the Court concluded that, whether or not an action to recover on a state wrongful death remedy could be initiated in a federal admiralty court, such a remedy could be recognized in a limitation of liability proceeding. The Court explained that state law created "an *obligatio*, a personal liability of the owner [of a vessel] to the claimants" which "admiralty would not disregard, but would respect * * * when brought before it in any legitimate way" and that, in a limitation of liability proceeding, "all claims to which the admiralty does not deny existence must be recognized." *Id.* at 405-406. Accord *La Bourgogne*, 210 U.S. 95, 138-139 (1908). Second, in *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 240-242 (1921), the Court held that when state law provided a wrongful death remedy applicable to an admiralty cause of action, the remedy could be enforced in a federal admiralty suit. (Later, in *Moragne* v. *States Marine Lines, Inc.*, 398

In *In re Garnett*, 141 U.S. 1 (1891), this same understanding of the Limitation of Liability Act served as the basis for this Court's rejection of a constitutional challenge to the Act's application to vessels allegedly involved only in intrastate commerce. Referring to an 1886 amendment to the Act extending it to inland navigation, the Court explained (*id.* at 12):

> It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.[11]

U.S. 375 (1970), the Court recognized a federal wrongful death remedy in admiralty cases.)

Amicus Maritime Law Association argues that *Butler* and *The Hamilton* established that "claims not falling within the general maritime jurisdiction could be brought in a limitation of liability proceeding," suggesting that *Richardson* did not reflect a major change in the law. MLA Br. 18. But throughout the period prior to *Western Fuel Co.* v. *Garcia*, *supra*, it was far from clear that state wrongful death claims arising from maritime torts were outside general maritime jurisdiction. See *Western Fuel Co.* v. *Garcia*, 257 U.S. at 241 (citing preexisting authority for the conclusion it reached); *The Harrisburg*, 119 U.S. 199, 214 (1886) (reserving the question whether a state wrongful death statute could be enforced in admiralty). More fundamentally, both *Butler* and *The Hamilton* dealt with maritime torts on navigable waters, and thus in holding that state wrongful death remedies were subject to a limitation proceeding, the Court had no occasion to consider whether the Limitation of Liability Act applied outside the preexisting boundaries of admiralty law.

[11] Evidently, the Court viewed Congress's authority to prescribe rules of admiralty to be broader than its authority under the Commerce Clause. The Court had previously upheld the Act's application to the high seas under the Commerce Clause, *Lord* v. *Steamship Co.*, 102 U.S. 541 (1881), but chose not to rely on the same constitutional provision in *In re Garnett*.

It is now established that Congress has authority to enact legislation touching areas of maritime concern that effectively extend admiralty jurisdiction to accidents that might otherwise be considered non-maritime. See, *e.g.*, *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40-41 (1943). However, that power is not without limits. See *id.* at 43. Moreover, in considering whether Congress intended, in its 19th century enactments, to extend maritime law, it should be borne in mind that the constitutional authority for such a step would have been open to debate. See *Crowell* v. *Benson*, 285 U.S. 22, 55 (1932) ("In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction.").

In short, until *Richardson*, all of this Court's cases were consistent with the view that the Limitation of Liability Act was an addition to the system of maritime law that applied "to all matters and places to which the maritime law extends," but no farther.

B. The 1884 Amendment To The Limitation Of Liability Act Did Not Reflect An Intention To Extend The Statute To Non-Maritime Torts

In *Richardson* v. *Harmon*, *supra*, the Court returned to the question in *Ex parte Phenix* and reached the opposite conclusion. In *Richardson*, a steam barge had collided with a bridge, and the owners of the barge initiated a proceeding to limit their liability in federal court. The Court acknowledged that, like the casualty in *Ex parte Phenix*, the collision was a non-maritime tort and "as such not within the cognizance of an admiralty court." 222 U.S. at 101. It also recognized that the original Limitation of Liability Act would not have encompassed such a tort, noting that the 1851 enactment "embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts." *Id.* at 103. However,

the Court held that Section 18 of the Act of June 26, 1884, ch. 121, 23 Stat. 57-58, "was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included," including non-maritime tort claims. 222 U.S. at 105. "Thus construed," the Court continued, "the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts." *Id.* at 106.

In our view, however, neither the language nor the legislative history of the 1884 statute supports construing it as such a sharp break with the prior understanding of the Limitation of Liability Act.

1. *The Language of the 1884 Enactment.*—A prominent admiralty treatise has said of the 1884 Act, "No doubt when more obscure statutes are drafted, the Congress will draft them, but it is difficult to believe that any future body of law makers will ever surpass this extraordinary effort." G. Gilmore & C. Black, *supra*, § 10-13, at 845. A major interpretive difficulty arose from the fact that the 1884 statute was not styled as an amendment to the Limitation of Liability Act; thus, it might have been read to supersede preexisting law, to modify it, or to clarify it without substantial change.

In *Richardson*, this Court concluded that in most respects the 1884 Act was not intended to alter the settled procedural and substantive provisions of the 1851 Act. The Court observed that the 1884 Act declared "[n]o purpose to repeal or qualify any of the terms of the existing liability law"; that the Act was "in *pari materia* with" the earlier legislation; and thus that it was unnecessary to conclude that the 1884 Act was "a repealing act as to any of the qualifications of the preceding limitations" contained in the earlier Act. 222 U.S. at 103, 105. See G. Gilmore & C. Black, *supra*, § 10-13. Nevertheless, *Richardson* concluded that the 1884 Act substantially expanded the nature of the liabilities subject to limitation.

The text of the 1884 enactment, however, does not suggest any intention fundamentally to alter the previously established relation between the Limitation of Liability Act and federal maritime law, let alone to single out that feature of the statute for a radical change. The 1851 Act limited a vessel owner's liability for, *inter alia*, "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner" (46 U.S.C. App. 183(a)), whereas the 1884 amendment limited the shipowner's liability "to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole" (46 U.S.C. App. 189). Nothing in these two formulations suggests that the earlier enactment, but not the latter, should incorporate limitations on federal maritime jurisdiction.

2. *The Legislative History.*—The legislative history of the 1884 limitation of liability provision is entirely silent on the question whether it was intended to extend the concept of limited liability for shipowners to non-maritime torts.[12] When the provision was reported to the floor of the Senate, it was described, in modest terms, as "not so great a change as appears on the face of the law." 15 Cong. Rec. 976 (1884) (remarks of Sen. Frye).[13] Later, in a very brief exchange, one Senator

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[12] In 1884, the House and the Senate considered separate bills providing a variety of forms of relief for the shipping industry. H.R. 2228, 48th Cong., 1st Sess. (1884); S. 1448, 48th Cong., 1st Sess. (1884). Congress ultimately passed the House bill, although it was extensively amended to incorporate provisions from the Senate bill. The provision to limit shipowners' liability originated in the Senate bill. Although the proposed shipping legislation was debated at length in both Houses, the limitation of liability provision received only very brief attention on the floor of the Senate, 15 Cong. Rec. 976, 3970-3972 (1884), and none on the floor of the House. See also 15 Cong. Rec. 5440 (1884) (conference committee report).

[13] Senator Frye's remarks, though somewhat obscure, suggest that the impetus for the legislation was concern that large investors

suggested that its only purpose was to protect shipowners from contractual liabilities.[14] There is no indication that Congress considered—or meant to depart from—this Court's understanding of the scope of the 1851 Act.

In *Richardson*, the Court found support for its understanding of the 1884 enactment in a dictum in *Butler*,

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might be held responsible for the entire amount of debts incurred in the shipping ventures that they undertook with partners of lesser means and, therefore, that they should be given protection comparable to that provided by the corporate form. He stated (15 Cong. Rec. 976 (1884)):

> Section 18 limits the individual liability of a ship-owner for any and all debts and liabilities to the proportion that his individual share of the vessel bears to the whole. That is not so great change as appears on the face of the law. By statute to-day any shareholder in a vessel is liable for no more than the value of the share for any tort of the master or in case of collision or in any other way except by contract. But those provisions of the law are not generally understood. They follow the English and the French law almost word for word. There is to-day a feeling among the capitalists of this country that it is exceedingly dangerous to put capital into a ship where there may be twenty owners and only one of them really a man of wealth, and he responsible for the entire debt contracted. The English have the same limited liability provided for in this section, only in another form. They have a general law of "limited liability," by which any dozen men desiring to build a ship or a steamer can simply incorporate themselves for that single purpose, and then their liability under that act of incorporation shall be the owner's share of the vessel and no more. The bill which we report does the same thing, only in another form. It is believed that it will remove a difficulty under which our capitalists have labored, will give them courage to invest in ships, and will do a great deal more towards encouraging ship-building and ship-owning than really the law itself which we report would authorize.

Accord 15 Cong. Rec. 3650 (1884) (remarks of Sen. Frye). See also *id.* at 3970-3971.

[14] 15 Cong. Rec. 3971 (1884) (remarks of Sen. Vest):

> Mr. MILLER, of California. Why is not the provision in the Revised Statutes as it stands now sufficient?
>
> Mr. VEST. It does not apply to contracts at all, only to torts.

130 U.S. at 554, that it was "possible" that the 1884 amendment "was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without the privity or knowledge of the owner." However, as we have shown, the Court in *Butler* evidenced no doubt about whether the Act might extend to non-maritime torts; to the contrary, it emphasized the connection between the Limitation of Liability Act and the general scope of maritime law. The "doubts" referred to in *Butler* evidently arose from "[v]arious attempts * * * to narrow the objects of the statute," 130 U.S. at 550, even within the limits of maritime law, for instance by excluding liabilities from collisions and fire, See 130 U.S. at 550, 554. Indeed, *Butler* observed that the 1884 amendment was "explanatory of the intent of Congress in this class of legislation," *id.* at 554, thus suggesting that it was merely a clarification of the understanding of the statute that *Butler* presented in some detail.

We submit that the correctness of *Richardson's* analysis of the 1884 enactment on which it relied is, at the least, open to serious question.

C. Since *Richardson*, Lower Federal Courts Have Declined In Practice To Apply The Limitation Of Liability Act To All Non-Maritime Torts

After *Richardson*, it has often been said that "[p]roceedings by vessel owners to limit their liability as permitted by [the Limitation of Liability Act] are within the admiralty jurisdiction even if the claims limited against might not be sued upon in admiralty." 1 S. Friedell, *Benedict on Admiralty* § 225 (7th ed. 1989).[15]

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[15] See, *e.g.*, *Just* v. *Chambers*, 312 U.S. 383, 386 (1941) (Limitation of Liability Act "extends to tort claims even when the tort is non-maritime"); *Detroit Trust Co.* v. *The Barlum*, 293 U.S. 21, 44-45 (1934); *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U.S. 207, 217 (1927) (court of admiralty acquires the right to marshal "all claims, whether of strictly admiralty origin or not");

However, in practice, the Limitation of Liability Act has not been held to apply to all cases to which this proposition extends.

In particular, courts have refused to apply the Limitation of Liability Act to claims arising from torts on non-navigable waters, even though such claims would seem to fall within *Richardson's* expansive interpretation of the debts and liabilities subject to the Act.[16] *Richardson* held that the situs of a tort in relation to the traditional bounds of maritime law was irrelevant to the application of the Act, and its reasoning does not recognize a distinction between torts occurring on land adjoining navigable waters and those taking place elsewhere. Thus, these lower court holdings, which at best are difficult to square with *Richardson's* rationale, lend support to our view that the Limitation of Liability Act can not reasonably be applied without reference to limits on maritime law derived from other sources.

Petitioner does not refer to the cases involving torts on non-navigable waters but attempts to sidestep them by confining his attention to cases involving "non-maritime, or allegedly non-maritime torts, which occur[] upon, *or in relation to* navigable waters." Pet. Br. 37 (emphasis added). The implication is that the Act might fairly be construed to require some "relation to navigable waters," thereby preserving its inapplicability to non-navigable

The No. 6, 241 F. 69 (2d Cir. 1917); *The Rochester*, 230 F. 519, 521 (W.D.N.Y. 1916); *The Irving F. Ross*, 8 F.2d 313 (D. Mass. 1923); *In re Highland Nav. Corp.*, 24 F.2d 582, 585 (S.D.N.Y. 1927); *The Atlas No. 7*, 42 F.2d 480 (S.D.N.Y. 1930); *In re Colonial Trust Co.*, 124 F. Supp. 73, 75 (D. Conn. 1954); *The Trim Too*, 39 F. Supp. 271, 273 (D. Mass. 1941).

[16] *E.g.*, *In re Three Buoys Houseboat Vacations U.S.A., Ltd.*, 878 F.2d 1096 (8th Cir. 1989); *Marroni* v. *Matey*, 492 F. Supp. 340 (E.D. Pa. 1980); *In re Hoeser's Petition*, 227 F. Supp. 81 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960); *In re Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965); But cf. *In re Reading's Petition*, 169 F. Supp. 165 (N.D.N.Y. 1958), aff'd, 271 F.2d 959 (2d Cir. 1959).

waters, but not to embody whatever relationship to navigable waters and other standards are required to confer admiralty jurisdiction generally. Though petitioner's suggestion conforms to the results in many, though not all, of the reported cases,[17] the statute provides no support for such an intermediate standard—somewhere between "any or all debts and liabilities," whether maritime or non-maritime, and the generally applicable standards for distinguishing between maritime and non-maritime torts. Rather than attempting to fashion such a standard, this Court, we submit, should reconsider whether the Limitation of Liability Act is coextensive with admiralty jurisdiction.

D. Other Developments Regarding The Scope Of Admiralty Jurisdiction Support Restricting The Limitation Of Liability Act To Maritime Torts

Two related developments in the area of admiralty jurisdiction since *Richardson* also support reconsideration of its construction of the Limitation of Liability Act. First, Congress has eliminated the artificial limit on admiralty jurisdiction that undoubtedly contributed to that decision. At the time *Richardson* was decided, injuries caused by vessels on navigable waters to persons and property on land fell outside admiralty jurisdiction. Thus, as *Richardson* noted, defining the Act to incorporate this gap in admiralty jurisdiction would "leave an owner subject to a large class of obligations arising from non-maritime torts," a result in conflict with the purpose of the statute. 222 U.S. at 104. The Extension of Admiralty Jurisdiction Act, 46 U.S.C. App. 740, has since enlarged admiralty jurisdiction to include "all cases of damage or injury, to person or property, caused by a

[17] In addition to this case, there are several decisions in which courts have declined to apply the Limitation of Liability Act to torts that have been determined to be non-maritime. *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *Clinton Bd. of Park Comm'rs* v. *Claussen*, 410 F. Supp. 320 (S.D. Iowa 1976).

vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." [18] Thus, reestablishing the link between the Limitation of Liability Act and admiralty jurisdiction would not change the result in *Richardson* or in other comparable cases involving damage or injury on land.

Second, this Court's recent decisions stress that the limits of admiralty jurisdiction, while reflecting the importance of uniform federal maritime law, must also avoid unnecessary encroachment on state law. In *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), for instance, the Court refused to recognize federal admiralty jurisdiction over an action by a longshoreman for damages arising from an injury on a pier. The Court noted that it was "dealing here with the intersection of federal and state law" and that an extension of federal jurisdiction would "intrude on an area that has heretofore been reserved for state law." *Id.* at 211-212. The Court concluded: "At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law." *Id.* at 214. The requirement that a tort bear a significant relationship to traditional maritime activity also reflects an unwillingness unnecessarily to intrude on areas reserved for state law. See *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. at 272-273. The same concern supports excluding from the Limitation of Liability Act tort claims that would otherwise be governed entirely by state law. Although permitting state law to define claims within its scope, the Act in practice may extinguish or severely limit recovery and may deny plaintiffs the opportunity to litigate in a state forum of their choice.

In view of present conceptions of federal admiralty jurisdiction, we perceive no federal maritime interest that justifies such limitations on state-created liabilities

[18] See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 209-210 (1971); *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209-210 (1963); *United States* v. *Matson Nav. Co.*, 201 F.2d 610, 613-616 (9th Cir. 1953).

arising from torts having no significant relationship with traditional maritime activities. In general, construing the Limitation of Liability Act not to encompass such liabilities would affect only state law claims arising from accidents involving vessels not on navigable waters and whatever pleasure boat accidents may be held not to have a significant relationship to traditional maritime activity. See MLA Br. 21-22.[19] The purpose of the Limitation of Liability Act, which was to encourage investment in the shipping industry, *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) at 121; 3 A. Jenner, E. Flynn & J. Loo, *Benedict on Admiralty* §§ 6-7 (7th ed. 1989), does not support protecting vessel owners from claims of this type, particularly where the effect is to interfere with state law that would otherwise be completely outside the scope of federal maritime law.[20]

[19] Under the interpretation we propose, the Limitation of Liability Act would incorporate both judicial and statutory refinements of the admiralty and maritime jurisdiction. Thus, when Congress creates a statutory maritime liability that effectively extends the scope of admiralty jurisdiction, see, *e.g.*, *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943) (Jones Act applies to onshore injury to deckhand on vessel), such a liability will be subject to limitation. Similarly, the Act would incorporate the expansion of jurisdiction effected by the Extension of Admiralty Jurisdiction Act and any subsequent extensions of that nature. Of course, in creating maritime liabilities, Congress may exempt them from the Limitation of Liability Act, as it has in connection with certain actions under the Death on the High Seas Act, 46 U.S.C. App. 764 (certain foreign-law claims may be brought in admiralty in the United States "without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding").

[20] Hypothesizing that a single accident may give rise to maritime and non-maritime claims, amicus Maritime Law Association suggests that our interpretation of the Act would "defeat the objectives of *concursus* [the resolution of claims against an owner in a single proceeding] and a single fund for all claims to have proceedings in different courts." MLA Br. 21. Moreover, MLA continues, even in cases involving damage inflicted solely on land, "the expertise of

Although the interpretation of the Limitation of Liability Act that we advocate is inconsistent with the reasoning of *Richardson*, we submit that the doctrine of *stare decisis* should not foreclose reconsideration of that

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an admiralty court is useful in determining the shipowner's liability and whether it is entitled to limit that liability." *Ibid.* This argument is circular. The very question at issue is whether the limited liability *concursus*, single fund, and expertise of an admiralty court should be available for non-maritime torts. Moreover, it will be rare, under modern admiralty analysis, that a maritime tort will give rise to maritime and non-maritime claims. A plaintiff injured by a maritime tort may invoke admiralty jurisdiction in seeking both remedies available under federal law and state remedies that do not unduly interfere with the characteristic features of the maritime law. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 339 (1973). Those state remedies that do interfere with maritime law are preempted, whether asserted in federal or state court. The only torts that may generate a mix of maritime and non-maritime claims would be cases in which a party could invoke a federal statutory remedy, such as the Jones Act, for what would otherwise be a non-maritime tort. Although the Court need not now consider the proper treatment of that unusual situation, we believe it would not be inappropriate to hold that the state claim is outside the scope of the Limitation of Liability Act. Cf. *Hines, Inc.* v. *United States*, 551 F.2d 717 (6th Cir. 1977).

Petitioner's amici also rely on a 1936 amendment to the Act, now codified at 46 U.S.C. App. 185, that provides that a vessel owner "may petition a district court of the United States of competent jurisdiction for limitation of liability * * *." MLA Br. 14 & n.3; American Auto Br. 21. This amendment is irrelevant to the issues before the Court. By its terms, it does not confer any jurisdiction on the district courts; its reference to a court of "competent jurisdiction" indicates that jurisdiction must be derived from some other source. See *Kansas City Power & Light Co.* v. *McKay*, 225 F.2d 924, 932-933 (D.C. Cir.) (construing virtually identical language in the Administrative Procedure Act), cert. denied, 350 U.S. 884 (1955). Further, it does not purport to define the scope of the Act. Because the Limitation of Liability Act is a part of the maritime law, federal jurisdiction to administer its terms is conferred by 28 U.S.C. 1333; that jurisdiction, however, is no broader than the liabilities subject to limitation under the Act.

case's validity as applied in the modern context. See *Patterson* v. *McLean Credit Union* 109 S. Ct. 2363, 2370-2371 (1989). As has been shown, *Richardson* itself departed from the previously settled understanding of the Act. Its interpretation of the 1884 limited liability statute is open to question, and its suggestion that liabilities are subject to limitation without any regard to the boundaries of federal maritime law has, in practice, been ignored in cases involving non-navigable waters. Significantly, there has been "intervening development of the law," through both "the growth of judicial doctrine" and "further action by Congress," that has "removed or weakened the conceptual underpinnings" of *Richardson*, and that decision is now difficult to reconcile with the contemporary understanding of the proper division between state and federal law. See *Patterson* v. *McLean Credit Union*, 109 S. Ct. at 2370-2371. Moreover, *Richardson* had no occasion to consider the precise issue presented here—whether the Limitation of Liability Act applies to an accident even if the accident falls outside admiralty jurisdiction because it bears no significant relationship to traditional maritime activity.

* * * * *

In summary, we believe that under the rationale of the *Richardson* decision, the Limitation of Liability Act would apply to the facts of this case whether or not the accident in suit involves a maritime tort. But the holding of *Richardson* should, in our view, be reconsidered for two reasons. First, the original understanding of the Limitation of Liability Act of 1851 was that the Act did not extend to non-maritime torts, and we submit that the 1884 enactment relied on in *Richardson* did not abrogate that understanding. Second, events since *Richardson*—particularly the enactment of the Extension of Admiralty Jurisdiction Act and decisions by this Court that refine the scope of admiralty jurisdiction—have further undercut *Richardson*'s validity. Thus, with respect to liability in tort, the Limitation of Liability Act should again be

held to apply only to those torts that would otherwise be within the scope of federal admiralty jurisdiction. Under this view, the applicability of the Act, and the existence of federal jurisdiction, should depend on whether the casualty at issue qualifies as a maritime tort.

CONCLUSION

For the foregoing reasons, this Court should reconsider its decision in *Richardson* v. *Harmon* and hold that the Limitation of Liability Act does not provide an independent basis for federal jurisdiction.

Respectfully submitted.

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No. 88-2041

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICAN AUTO, INC. IN SUPPORT OF PETITIONER, EVERETT A. SISSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

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MOTION IN SUPPORT OF LEAVE TO FILE BRIEF AMICUS CURIAE OF AMERICAN AUTO, INC. IN SUPPORT OF PETITIONER, EVERETT A. SISSON

American Auto, Inc. ("American Auto") respectfully moves that this Court grant it leave to file the attached brief *Amicus Curiae* in support of the position of the petitioner, Everett A. Sisson. American Auto has not been successful in obtaining the written consent of the parties to the case, and thereby files this motion contemporaneously with its proposed brief *Amicus Curiae* pursuant to Supreme Court Rule 36.3.

INTEREST OF THE AMICUS CURIAE

The interest of American Auto in this case arises from the fact that American Auto is the appellant in the pending Ninth Circuit case known as *In The Matter Of The Complaint Of American Auto, Inc.*, Court of Appeals No. 89-15689. The written briefing

before the Ninth Circuit has been completed in *American Auto*, but no date has been assigned for oral argument. The appeal in *American Auto* is from a reported district court decision *In the Matter of the Complaint of American Auto, Inc.*, 1989 A.M.C. 1489 (N.D. Cal. 1989). The district court dismissed the case, adhering to the Seventh Circuit admiralty jurisdictional tests articulated *In The Matter Of The Complaint Of Sisson* 867 F.2d 341 (7th Cir. 1989). American Auto does not believe that its position will be adequately presented by the parties to the *Sisson* case, within the meaning of Rule 36.3, unless this brief is considered.

In The Matter Of The Complaint Of American Auto, Inc. presents the same issues that are before the Court in the present case: First, whether torts involving noncommercial pleasure vessels which pose a potential threat to commercial shipping are sufficiently related to traditional maritime activity to permit a federal court to exercise admiralty jurisdiction even where the tort does not implicate navigation; and second, whether the Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.*, independently creates subject matter jurisdiction in the federal courts statutorily, separate and distinct from the test for constitutional admiralty/maritime jurisdiction.

More importantly, the facts in the *American Auto* case provide a vivid illustration that the Seventh Circuit's jurisdictional tests would be difficult to apply and would disrupt the uniform application of federal maritime law. American Auto believes that the facts presented by *Sisson* are deceptively straightforward. *Sisson* involves a vessel which burned within its sheltered marina, with no loss of life or injury to persons. Neither was there any danger of the inconsistent application of other federal maritime statutes.

American Auto presents more difficult issues. Its factual pattern has a far closer nexus with traditional maritime activity than is presented to this Court in *Sisson*, and thus highlights deficiencies in the rule adopted by the Seventh Circuit.

American Auto filed a complaint seeking exoneration from or limitation of liability under 46 U.S.C. § 183 *et. seq.* for injuries and/or damages arising out of a fire aboard the vessel ANTICIPATION on January 9, 1988 off the coast of Cabo San Lucas, Mexico.

On April 21, 1989, the district court granted the claimant's motion to dismiss based upon its reading of the Seventh Circuit case, *Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989). The district court held that admiralty jurisdiction did not apply because torts involving noncommercial pleasure vessels are not sufficiently related to traditional maritime activity within the meaning of *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972), and *Foremost Insurance Company v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982), unless the tort involves at least a potential threat to commercial shipping and involves navigation.

PRACTICAL CONCERNS RAISED BY THIS AMICUS WHICH MAY NOT BE ADDRESSED BY THE PARTIES TO THIS PETITION

The factual background to American Auto's limitation petition should raise concerns with this Court as to the wisdom of adopting the Seventh Circuit's reasoning or limiting this Court's expansive language in *Foremost*. The facts presented in *American Auto*, which this Court could consider at least in the context of raising hypothetical problems, illustrate the difficulty in interpreting *Foremost* restrictively.

As reflected by the district court opinion in *In the Matter of the Complaint of American Auto, Inc.*, and in the briefs and record with the Ninth Circuit in that appeal (Court of Appeals No. 89-15689), the following facts were introduced on the admiralty jurisdictional issue in the *American Auto* case.

(1) The yacht ANTICIPATION, owned by American Auto, burned and sank at night while at her moorage off the coast of Cabo San Lucas, Mexico, on January 9, 1988.

(2) The mooring to which the ANTICIPATION was attached on the night of the fire was located in an open harbor, fronting the Pacific Ocean. The vessel was anchored hundreds of yards from the shore in the outer harbor of Cabo San Lucas, in the vicinity of the main shipping channel leading to the inner

harbor. Commercial vessels, such as large passenger ferries, fishing boats and passenger cruise line shore boats transit the main ship channel to enter the Cabo San Lucas inner harbor.

(3) At the time of the loss, the vessel had seven people on board, including two professional crew members.

(4) Two passengers on board the vessel died, and several of the other people on board suffered personal injuries. The vessel herself was a total loss.

(5) Immediately prior to the loss, the ANTICIPATION had just completed transiting international waters in the Pacific Ocean, having travelled from San Diego, California to Cabo San Lucas, Mexico.

(6) The yacht ANTICIPATION was used as a meeting and entertainment place for employees, business clients, prospective clients and guests, as well as for pleasure and recreation. The vessel at no time carried fare-paying passengers nor did it transport any cargo for compensation.

(7) The Port Captain of Cabo San Lucas required American Auto to mark the site of the sunken wreck with a lit buoy, on the basis that it constituted a hazard to navigation.

(8) The yacht, after it sank, was ordered by the Port Captain of Cabo San Lucas to be raised, brought to the beach and destroyed, as a hazard to navigation.

(9) The representatives of the two deceased passengers filed claims in the federal limitation action and separate suits in the California courts alleging the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 *et. seq.*, as a basis of jurisdiction.

The allegations made against American Auto involve the vessel's operation, management, maintenance, and seaworthiness. The claimants in *American Auto* have alleged, among other matters, that the vessel owner (1) failed to maintain a seaworthy vessel, particularly in regard to her fire warning systems, extinguishing systems and available escape routes, (2) failed to hire and train a competent, professional crew, (3) failed to maintain a

proper lookout at night, and (4) failed to conduct adequate safety drills.

Claims have been made against American Auto in the limitation action and pursuant to DOHSA. The facts in *American Auto*, more dramatically than those in the *Sisson* case before this Court, highlight the fact that the federal admiralty statutes operate in a complex interplay to protect and define the rights and obligations of the parties to maritime disputes.

CONCLUSION

American Auto respectfully requests that this Court grant it leave to file the attached proposed Brief *Amicus Curiae* in Support of Petitioner Everett A. Sisson on the basis that *Amicus Curiae* American Auto can present to this Court a different perspective which illustrates the difficulty of applying the Seventh Circuit jurisdictional tests, and their adverse effect upon a multitude of admiralty cases.

Dated: March 2, 1990.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

Statutes

Treatises

TABLE OF AUTHORITIES

Rules

Other Authorities

No. 88-2041

In the Supreme Court
OF THE
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INTEREST OF THE AMICUS CURIAE

The interest of American Auto in this case arises from the fact that American Auto is the appellant in the pending Ninth Circuit case known as *In The Matter Of The Complaint Of American Auto, Inc.*, Court of Appeals No. 89-15689. The written briefing before the Ninth Circuit has been completed in *American Auto,* but no date has been assigned for oral argument. The appeal in *American Auto* is from a reported district court decision, *In the Matter of the Complaint of American Auto, Inc.*, 1989 A.M.C.

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In The Matter Of The Complaint Of American Auto, Inc., presents the same issues that are before this Court in the present case: First, whether torts involving noncommercial pleasure vessels which pose a potential threat to commercial shipping are sufficiently related to traditional maritime activity to permit a federal court to exercise admiralty jurisdiction even where the tort does not implicate navigation; and second, whether the Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.* independently creates subject matter jurisdiction in the federal courts statutorily, separate and distinct from the test for constitutional admiralty jurisdiction.

More importantly, the facts in the *American Auto* case provide a vivid illustration that the Seventh Circuit's jurisdictional tests would be difficult to apply and would disrupt the uniform application of federal maritime law. American Auto believes that the facts presented by *Sisson* are deceptively straightforward. *Sisson* involve a vessel which burned within its sheltered marina, with no loss of life or injury to persons. Neither was there any danger of the inconsistent application of other federal maritime statutes.

American Auto, Inc. highlights more difficult issues. Its factual pattern has a far closer nexus with traditional maritime activity than is presented to this Court in *Sisson*, and highlights deficiencies in the rule adopted by the Seventh Circuit.

In *American Auto, Inc.*, a vessel (The "ANTICIPATION"), moored off the coast of Cabo San Lucas, Mexico in a bay open to the Pacific Ocean, burned and sank on January 9, 1988 near a main shipping channel, with loss of life. Suits were brought alleging the Death on the High Seas Act, 46 U.S.C. § 761 *et. seq.* (hereinafter referred to as "DOHSA"), as a basis of jurisdiction.

American Auto filed a complaint in the United States District Court for the Northern District of California seeking exoneration

from or limitation of liability under 46 U.S.C. § 183 *et. seq.*, for injuries and/or damages arising out of the fire aboard the vessel ANTICIPATION. Claims were filed in the limitation proceeding by the passengers aboard the vessel who survived the fire, and by the representatives of two deceased passengers who died as a result of the fire. Three of the claimants moved the district court to dismiss American Auto's limitation complaint for lack of subject matter jurisdiction and/or for summary judgment, arguing both that the loss did not involve issues of traditional maritime concern and that pleasure vessels should not be included within the jurisdictional limits of the Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.*, and/or the general maritime law.

On April 21, 1989, the district court granted the claimants motion to dismiss based upon its reading of the Seventh Circuit case, *Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989). The district court held that admiralty jurisdiction did not apply because torts involving noncommercial pleasure vessels are not sufficiently related to traditional maritime activity within the meaning of *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972); and *Foremost Insurance Company v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982), unless the tort involves at least a potential threat to commercial shipping and involves navigation. The district court did not address the issue of whether or not the Limitation of Liability Act, 46 U.S.C. § 183 *et. seq.* creates an independent, statutory basis of subject matter jurisdiction in the federal courts, separate and distinct from the test for constitutional admiralty jurisdiction.

American Auto suggests that it is important for this Court to recognize the impact that its forthcoming opinion will have upon cases which are currently being adversely affected by the newly fashioned Seventh Circuit jurisdictional tests. The district court decision in *American Auto* exemplifies the logical inconsistencies that result from attempting to apply the Seventh Circuit rule to differing factual situations.

SUMMARY OF ARGUMENT

1. The Seventh Circuit interpreted the language in *Foremost* in an overly restrictive manner, in concluding that admiralty tort jurisdiction in cases involving pleasure vessels extends only to those cases which involve navigational wrongs and which have a potentially disruptive impact on commercial activity. In cases involving pleasure vessels, such an approach improperly restricts the definition of traditional maritime activity to only those cases directly involving collisions or those involving interpretations of navigational rules of the road.

2. The Seventh Circuit, by misconstruing this Court's decisions on admiralty jurisdiction (*Executive Jet* and *Foremost*), has created new tests to determine jurisdiction which would be extremely difficult to apply.

3. The Seventh Circuit's jurisdictional tests, if adopted by this Court, would result in a patchwork application of state and federal law to the same tortious event. *American Auto* illustrates that if the Seventh Circuit's tests are followed, when a single vessel burns and sinks in foreign waters, representatives of any decedents would be restricted to remedies permitted under DOHSA and the professional crew's rights and remedies would be defined by the Jones Act, 46 U.S.C. § 688 et. seq., yet the vessel owner would be deprived of admiralty jurisdiction, in any forum, to file its petition for exoneration from or limitation of liability.

4. The Limitation of Liability Act provides an independent basis of jurisdiction separate and distinct from the test necessary for finding the existence of constitutional admiralty jurisdiction. It provides a statutory basis for courts to exercise jurisdiction which does not require the involvement of traditional maritime activity within the meaning of *Executive Jet* and *Foremost*.

PRACTICAL CONCERNS RAISED BY THIS AMICUS WHICH MAY NOT BE ADDRESSED BY THE PARTIES TO THIS PETITION

The factual background to American Auto, Inc.'s limitation petition, should raise concerns with this Court as to the wisdom of adopting the Seventh Circuit's reasoning or restricting this

Court's expansive language in *Foremost*. The facts presented in *American Auto*, which this Court could consider at least in the context of raising hypothetical problems, illustrate the difficulty in interpreting *Foremost* restrictively.

As reflected by *In the Matter of the Complaint of American Auto, Inc., supra* and the briefs and record with the Ninth Circuit in that appeal (Court of Appeals No. 89-15685), the following facts were introduced on the admiralty jurisdictional issue in the *American Auto* case.

(1) The yacht ANTICIPATION, owned by American Auto, Inc. burned and sank at night while at her moorage off the coast of Cabo San Lucas, Mexico, on January 9, 1988.

(2) The mooring to which the ANTICIPATION was attached on the night of the fire was located in an open harbor, fronting the Pacific Ocean. The vessel was anchored hundreds of yards from the shore in the outer harbor of Cabo San Lucas, in the vicinity of the main shipping channel leading to the inner harbor. Commercial vessels, such as large passenger ferries, fishing boats and passenger cruise line shore boats transit the main ship channel to enter the Cabo San Lucas inner harbor.

(3) At the time of the loss, the vessel had seven people on board, including two professional crew members.

(4) Two passengers on board the vessel died, and several of the other people on board suffered personal injuries. The vessel herself was a total loss.

(5) Immediately prior to the loss, the ANTICIPATION had just completed transiting international waters in the Pacific Ocean, having travelled from San Diego, California to Cabo San Lucas, Mexico.

(6) The yacht ANTICIPATION was used as a meeting and entertainment place for employees, business clients, prospective clients and guests, as well as for pleasure and recreation. The vessel at no time carried fare-paying passengers nor did it transport any cargo for compensation.

(7) The Port Captain of Cabo San Lucas required American Auto to mark the site of the sunken wreck with a lit buoy, on the basis that it constituted a hazard to navigation.

(8) The yacht, after it sank, was ordered by the Port Captain of Cabo San Lucas to be raised, brought to the beach, and destroyed.

(9) The representatives of the two deceased passengers filed claims in the federal limitation action and separate suits in the California courts alleging DOHSA as a basis of jurisdiction.

The allegations made against American Auto involve the vessel's operation, management, maintenance, and seaworthiness. The claimants in *American Auto* have alleged, among other matters, that the vessel owner (1) failed to maintain a seaworthy vessel, particularly in regard to her fire warning systems; extinguishing systems and available escape routes; (2) failed to hire and train a competent, professional crew; (3) failed to maintain a proper lookout at night; and (4) failed to conduct adequate safety drills.

The foregoing facts and allegations portray a typical maritime casualty involving issues which traditionally have been, and should be resolved by admiralty courts. The Seventh Circuit's rule applied to such maritime casualties would deny the litigants access to the court best suited to try those issues, and, by so doing, would jeopardize the uniformity of the United States maritime law.

ARGUMENT

A. The Seventh Circuit Court Construed The Test For Maritime Jurisdiction Too Narrowly

1. The Maritime Jurisdiction Test Formulated By The *Executive Jet* And *Foremost* Cases.

Prior to the Supreme Court's decision in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), a tort was within admiralty jurisdiction if it occurred on navigable waters. *THE PLYMOUTH,* 3 Wall 20, 70 U.S. 20, 36, 18 L.Ed. 125 (1865).

In *Executive Jet, supra* and later in *Foremost supra* this Court held that a "situs" on navigable waters is not sufficient to create a maritime tort. In addition to occurring on navigable waters, the wrong must have "a significant connection with traditional maritime activity." *See, Foremost Insurance v. Richardson, supra,* at 674. This "relationship" requirement has come to be known as the "maritime nexus" requirement. *Guidry v. Durkin,* 834 F.2d 1465 (9th Cir. 1987).

2. *Foremost* Continued To Extend Admiralty Jurisdiction To Noncommercial Vessels To Promote The Uniformity Of Rules Of Conduct; It Did Not Confine The Test For Admiralty Jurisdiction To A Disruption Of Commercial Activity.

In *Foremost,* this Court, in upholding admiralty tort jurisdiction over a collision involving two pleasure vessels, expressly noted that such jurisdiction extends beyond commercial activities:

> We also agree that there is no requirement that "the maritime activity be an exclusively commercial one." . . . Because the "wrong" here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court.
>
> *Foremost Insurance v. Richardson, supra* at 674.

This Court in *Foremost* stressed, by its own choice of italicized words, the necessity for the uniformity of rules of conduct to be applied to the operators of all vessels:

> Although the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce, petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters

> are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce [emphasis in text].
>
> *Id.*

This Court then offered an example, but apparently not an exclusive test, regarding the potential disruptive impact of vessel collisions:

> For example, if these two boats collided at the mouth of the St. Lawrence Seaway, there would be a substantial effect on maritime commerce, without regard to whether either boat was actively, or had been previously, engaged in commercial activity. Furthermore, admiralty law has traditionally been concerned with the conduct alleged to have caused this collision by virtue of its "navigational rules — rules that govern the manner and direction those vessels may rightly move upon the waters." [Citation omitted.] The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.
>
> *Id.*

From the above expansive language, it is apparent that this Court in deciding *Foremost* did not intend to confine its definition of traditional maritime activity to include only collisions or cases involving interpretations of the Rules of the Road.

The Seventh Circuit has interpreted footnote 5 to the *Foremost* case in an overly restrictive manner, and has ignored the broader language quoted above from the actual holding in the *Foremost* case. Footnote 5 provides:

> Fn.5. Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction. In *Executive Jet,* for example, we concluded that the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the

> water could create a hazard for the navigation of commercial vessels in the vicinity. However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate.
>
> *Id.* at 675.

The Seventh Circuit reasoned that since the *Foremost* decision mentioned that the "navigation" and "operation of a vessel" were "traditional maritime activities", jurisdiction was limited to cases involving wrongs arising out of those activities. *Sisson, supra*, at 345. The Seventh Circuit concluded (*Amicus* believes incorrectly) that:

> In our view, a persuasive interpretation of Foremost would confine the admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a "potentially disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.
>
> *Id.*

The Seventh Circuit emphasized how "limited its guidance" was in deciding the jurisdictional question:

> We are now presented with a case that tests the limits of the developing admiralty nexus doctrine: Does a fire on board a moored pleasure yacht, docked in the navigable waters of a recreational marina on Lake Michigan, bear a significant relationship to traditional maritime activity? Guidance from the [Supreme] Court on this question is limited to two cases: a collision in navigable waters between pleasure craft, that passes the test, and the crash of a land-based airplane in navigable waters, that fails the test.[1]

. . .

Fn. 1. We are obviously at an early stage in the development of doctrine here. The definitional boundaries are being refined through the process of inclusion and exclusion in particular cases.

Id. at 343.

The Seventh Circuit conceded that its holding applies "a narrow reading of 'traditional maritime activity' limiting application to cases involving navigation," stating that:

> Following the guidance given by careful scrutiny of the language in *Foremost*, we here apply a narrow reading of "traditional maritime activity," limiting application to cases involving navigation. Strong arguments, however, exist for broader treatment of this issue. Logically, fires aboard vessels — even when moored — are as much a traditional maritime concern as errors of navigation. Fire at sea, or at a mooring, is an ancient and dreaded hazard facing mariners.
>
> . . .
>
> It is also somewhat puzzling to find the [*Foremost*] Court using a broad phrase such as "traditional maritime activity" in discussions that then proceed to deal only with navigation.

Id. at 345.

The Seventh Circuit, which admitted it was heading into uncharted legal waters, apparently did not appreciate that this Court in *Foremost* spoke extensively of "navigational" and "operational" concerns in the context of a "nexus with traditional maritime activity," only because the facts in *Foremost* involved a pleasure boat collision. One would not have expected this Court to engage in a lengthy discourse upon maritime fires, groundings, salvage operations, torts on pleasure vessels, or a multitude of other possible factual settings which might give rise to jurisdiction.

There can be little doubt that fire on a vessel is regarded as one of the greatest dangers at sea. *See, Southport Fisheries v. Saskatchewan Gov. Ins. Office*, 161 F.Supp. 81, 83-4 (E.D.N. Carolina 1958). The Seventh Circuit in this case admitted as much:

> Logically fires aboard vessels — even when moored — are as much a traditional maritime concern as errors of navigation. Fire at sea, or at a mooring, is an ancient and dreaded hazard facing mariners.
>
> *In the Matter of the Complaint of Sisson, supra*, at 345.

Regulations promulgated by the United States Coast Guard promote and enforce fire safety on vessels. (See 46 C.F.R. §§ 72.03, 72.05, 72.15, 72.20 and § 76, generally.) Also, the *Safety of Life At Sea Convention* ("SOLAS"), 32 U.S.T. 47, has promulgated fire safety regulations utilized in evidence in federal maritime tort cases. *Meyers v. M/V EUGENIO C.*, 876 F.2d 38, 39 (5th Cir. 1989).

It is apparent that the Seventh Circuit became trapped in its "narrow interpretation" of traditional maritime activity, ignoring the underlying theme, principle and statement of the *Foremost* Court that:

> . . . petitioners take too narrow a view of the federal interest sought to be protected. The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity. This interest can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct. *Foremost v. Richardson, supra*, at 674-675.

In his concurring opinion in *Sisson*, Judge Ripple perceived that the majority had interpreted the language in *Foremost* too restrictively.

> In my view, *Foremost* does not compel restricting admiralty jurisdiction in noncommercial activities to matters directly involving the navigation of a vessel. In *Foremost*, the Supreme Court had to deal with an incident arising out of an alleged noncompliance with the "Rules of the Road." However, I do not read the Supreme Court's opinion as necessarily precluding jurisdiction based on other hazards

traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce.

In the Matter of the Complaint of Sisson, supra, at 351.

More recently, the Sixth Circuit explicitly disagreed with *Sisson*, in the case of *In Re Young*, 872 F.2d 176 (6th Cir. 1989):

> . . . we do not subscribe to the reasoning of *Sisson*. As Judge Ripple points out in his concurrence, the opinion is predicated on an indefensibly narrow reading of *Foremost Insurance*.

Id. at 178.

B. The Seventh Circuit Tests Are Difficult And Uncertain of Application, Contrary To The Requirements Of *Foremost*

1. Requiring That A Tortious Event Involve Navigational Error And That It Have "A Potentially Disruptive Impact" On Maritime Commerce Creates A Vague, Unworkable Jurisdictional Test.

A vessel docked in a marina which is involved in a tort, such as The *ULTORIAN* in the case presently before this Court, may not offer dramatic appeal for inclusion within admiralty jurisdiction. Yet, this *Amicus* suggests that if this Court were to attempt to fashion a restrictive jurisdictional test, elements of which require both "navigational" error and the potential disruption of maritime commerce, such a test would be difficult to apply and unjust in its effect. Does a 65-foot vessel wrecked in 35 feet of water 50 yards from the shifting edge of a main shipping channel present a potential disruption? A 200-foot vessel burning in 20 feet of water 450 feet from the edge of a channel? Or what about American Auto's vessel, *The ANTICIPATION*, which was located adjacent to a main shipping channel, and which subsequently was ordered by foreign governmental authorities to be marked and removed as a hazard to navigation?

In the Matter of the Complaint of American Auto, Inc., supra, the uncertainty in applying the Seventh Circuit's jurisdictional test is illustrated by the district court's decision in *American Auto*, which recognized that the wreck "might" disrupt maritime commerce, but termed the chance "remote" and therefore failed to uphold admiralty jurisdiction. If the tests are allowed to remain as vague as stated by the Seventh Circuit, district and circuit courts will be forced to struggle with the jurisdictional limits, on a case-by-case basis.

2. The Seventh Circuit Tests Would Exclude From Admiralty Jurisdiction Some Cases In Which The Alleged Wrongs Include The Negligent Operation, Management, Maintenance And Unseaworthiness Of A Vessel.

The Seventh Circuit, noting that their facts tested the "limits" of admiralty jurisdiction (at pg. 343), addressed the agreed facts that (1) a defective washer/dryer caused the fire, (2) the fire occurred while the vessel was docked at a marina, (3) there were no personal injuries or deaths, and (4) there were *no allegations* regarding the negligent operation or maintenance of the vessel.

In contrast, in *American Auto*, (1) the cause of the fire remains unknown; (2) the fire occurred in foreign waters on a vessel moored hundreds of yards off shore in an open bay exposed to the Pacific Ocean; (3) there were multiple personal injuries and deaths, resulting in the applicability of federal maritime statutes, other than the Limitation Act; and (4) the representatives of deceased vessel passengers and personal injury claimants have brought claims against the vessel owner specifically alleging the negligent operation and maintenance of the vessel.

Literal adherence to the Seventh Circuit tests could result in a district court finding, just as the district court found in *American Auto*, that even where there are allegations of operational negligence, improper crewing, improper maintenance and unseaworthiness of a vessel, admiralty jurisdiction is inapplicable because the alleged "wrongs" were not "navigational" (in that no collision was involved) and the location of the wreck was unlikely to disrupt maritime commerce. Historically, admiralty courts have been concerned not only with the danger of fire at sea, but also that vessels are properly manned, operated, managed, maintained and are seaworthy. American Auto suggests that an adoption of the Seventh Circuit jurisdictional tests would result in precisely

the lack of uniformity over the conduct of vessels that this Court attempted to protect against in *Foremost*.

3. The Seventh Circuit Tests Would Exclude Some Cases In Which The Only Remedy For Deceased Passengers' Representatives Is Provided By The Death On The High Seas Act.

The Seventh Circuit tests raise the possibility that a vessel owner could be deprived of the right to petition to limit its liability under federal maritime law, while any deceased passengers' representatives would be compelled to assert DOHSA as a basis of jurisdiction. Specifically, DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States, the personal representative of the decedent may maintain his suit for damages in the District Courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if the death had not ensued.
>
> 46 U.S.C. § 761.

The federal courts have ruled that the term "high seas" as it is used in the above statute refers to all waters beyond the United States coast, including off foreign countries. *In Re Aircrash Disaster Near Bombay, Etc.*, 531 F.Supp. 1175, 1183 (W.D. Wa. 1982); *Moyer v. Klosters Rederi*, 645 F.Supp. 620, 623 (S.D. Fla. 1986) (death in the territorial waters off Mexico.) In *Moyer*, decided long after the *Foremost* decision, the district court held that the death of a vacationing swimmer, who suffered a heart attack while snorkeling in Mexican waters, had "a significant relationship to traditional maritime activity" because the swimmer had journeyed to Mexico on a commercial cruise line.

By illustration, in the *American Auto* case, the California courts will be required to rule that DOHSA and its more restrictive damage provisions pre-empt state wrongful death law

as to the two suits brought by decedents' representatives because of this accident. *Nygaard v. Peter Pan Sea Foods, Inc.*, 701 F.2d 77 (9th Cir. 1983); *Moyer, supra*, at 624.[1]

If DOHSA provides the jurisdictional basis for passengers' claims, and sets the legal standards for liability and damages, how can it logically be held that there is no admiralty jurisdiction over a limitation action arising from the same event? Independent statutory schemes, such as DOHSA, the Jones Act, and the Limitation Act, all of which apply distinctly to matters maritime, cannot be viewed in a vacuum. The statutes operate in a complex interplay to protect the rights and define the obligations of the parties to maritime disputes.

4. The Seventh Circuit Tests Would Exclude Some Cases In Which Paid Crew Have The Status To Bring Jones Act Claims.

It is hornbook law that paid vessel crew members, such as the captain and deckhands in the *American Auto* case, have the right to bring personal injury actions against their employer under the Jones Act, 46 U.S.C. § 688, *et. seq.* Norris, *"The Law of Seamen"*, § 30:3, (4th ed. 1988).

Just as with the wrongful death suits, the question must be asked: "How can the paid captain and deckhands on a vessel have the right to bring actions for injuries under the Jones Act, while at the same time the vessel owner is deprived of its rights under the Limitation of Liability Act?" The Seventh Circuit's negative answer to that question is reached by an overly narrow, restrictive interpretation of the *Foremost* holding. This *amicus* believes that the law requires that all such parties should have access to

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[1] *See also: Jennings v. Boeing Company*, 660 F.Supp. 796, 803 (E.D. PA. 1987); *Mancuso v. Kimex, Inc.*, 484 F.Supp. 453 (S.D. Fla. 1980) (death 300 feet off the coast of Jamaica); *Sanchez v. Loffland Brothers Company*, 626 F.2d 1228, 1230 (5th Cir. 1980), *cert. den.*, 452 U.S. 962, 101 S.Ct. 3112 (1981) (death on an inland Venezuelan lake); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277 (W.D. PA. 1983); *aff'd*, 735 F.2d 423 (3rd Cir. 1984), *cert. den.*, 459 U.S. 858, 105 S.Ct. 1888 (1984) (DOHSA applied to a death claim arising out of Bahamian territorial waters).

admiralty courts and admiralty remedies. That result can be achieved by rejecting the rule adopted by the Seventh Circuit.

5. It Is Logical, Fair, And Essential, That The Admiralty Jurisdiction Test Be Sufficiently Broad To Promote Uniform Rules Of Maritime Law Regarding Fire Safety On Vessels.

Once it is acknowledged that "traditional maritime activity" involves more than vessel navigation, it follows that any test for admiralty jurisdiction should be fashioned to promote, not minimize, uniform conduct and safety on all vessels. Such a rule can be fashioned by this Court by elaborating upon its language in *Foremost.*

The alternative would be to allow, on a case-by-case basis, various district courts to rule disparately whether cases involving issues of vessel maintenance, management, crewing, and multiple other aspects of conduct related to vessel operation, should or should not fall within the scope of admiralty jurisdiction. That would permit decisions such as the district court's decision in *American Auto;* which deprived the vessel owner of the opportunity to invoke the benefit and protection of the federal Limitation of Liability Act, despite the fact that the claimants have alleged the negligent operation, negligent maintenance, an incompetent crew and/or unseaworthy condition of the vessel; that wrongful death actions have been brought in state court by the representatives of deceased passengers under DOHSA; and that the two paid crew have the right to bring actions against the owner under the federal Jones Act.

A holding intimating that the federal government has no traditional concern to promote fire safety on all vessels, would stretch all credulity. Such a holding would result in a dramatically inequitable application of maritime statutes to all other vessel owners involved in litigation arising out of fire on board vessels.

C. The Limitation Of Liability Act Applies To Pleasure Vessels

American Auto concurs with the position of the United States, along with its reasoning and authorities cited, as to why the language of the Limitation Act must be interpreted, by rules of

statutory construction, to include "any vessel" [*Amicus Curiae of the United States,* filed in support of *Petition for Writ of Certiorari,* pp. 15-16, fn. 12]. Rather than re-briefing the same points, American Auto restricts its comments to the following.

1. Rules Of Statutory Construction Dictate That Pleasure Vessels Are Included Within The "Any Vessel" Language Of The Act.

One important rule of statutory construction was stated in *Air Transport, Etc. v. Profess. Air Traffic, etc.,* 667 F.2d 316 (2d Cir. 1981) as follows:

> First, we can presume that Congress is aware of settled judicial constructions of existing law. *Shapiro v. United States,* 335 U.S. 1, 16, 28 S.Ct. 1375, 1383, 93 L.Ed. 1787 (1948), and that it intends to retain those remedies that it has left in place, *Federal Maritime Terminals, Inc. v. Burnside Shipping Co.,* 394 U.S. 404, 412, 89 S. Ct. 1144, 1148, 22 L.Ed.2d 371 (1969).
>
> *Id.* at 321.

We can presume that in 1936 Congress knew that federal courts were construing 46 U.S.C. § 183(a) as applicable to pleasure yachts. If Congress did not intend for the limitation statutes to apply to pleasure yachts, the 1936 amendments were the time to say so. Instead, Congress did the opposite. In § 183(f) it ensured that limitation remained available for pleasure yachts without subjecting them to the $60 per ton provisions of § 183(b).

1 U.S.C. § 3 should eliminate any dispute over the meaning of the word "vessel":

> The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

According to § 3, then, every description of watercraft qualifies as a vessel. There is no requirement of a commercial purpose or use. This Court has held that a yacht or pleasure craft is a vessel under 1 U.S.C. § 3, *Foremost, supra* at 668, and that 1 U.S.C. § 3 should be used to define the word "vessel" as that word is used in

46 U.S.C. § 183(a). *Evansville & B.G. Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 46 S.Ct. 379, 70 L.Ed. 805 (1926).

Based upon the above rules of statutory construction, this Court has held the limitation statute applicable to pleasure yachts. *Just v. Chambers*, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941); *Coryell v. Phipps*, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943).

All circuit courts which have addressed the issue have construed the Limitation of Liability Act as applying to pleasure vessels. Since 1886, the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have applied the Act to pleasure vessels.[2] Within only the last few months, the Ninth and Eleventh Circuits have, by applying rules of statutory construction, upheld the Act's application to pleasure vessels. *In The Matter of the Complaint of Hechinger*, 890 F.2d 202, 206 (9th Cir. 1989); *In the Matter of the Complaint of Keys Jet Ski, Inc.* (11th Cir., 1990, Slip Opinion at 1525-1526.)

2. Logic, Public Policy and Fairness Require That Pleasure Vessels Be Given The Benefit of The Act.

Neither logic nor public policy supports a practice of allowing "commercial" interests to limit liability while denying that right to pleasure and recreational boat owners.

In the first place, carving out a pleasure boat exception would require that a line be drawn between "pleasure boating" and "commercial boating." In *Foremost*, this Court rejected a similar distinction for the purpose of tort jurisdiction because of the uncertainties sure to be created:

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[2]*See, Complaint of Interstate Towing Co.*, 717 F.2d 752 (2d Cir. 1983); *Richard v. Blake Builder's Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975); *Warnken v. Moody*, 22 Fed 960 (5th Cir. 1927); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975); *Holloway Concrete Products Co. v. Belts Beatty, Inc.*, 293 F.2d 474 (5th Cir. 1961); *Rauthbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951); *Pritchett v. Kimberling Cone, Inc.*, 568 F.2d 570 (8th Cir. 1977); *In Re Hechinger*, 890 F.2d 206 (9th Cir. 1989); Petition of *M/V SUNSHINE II*, 808 F.2d 762 (11th Cir. 1987).

> Yet, under the strict commercial rule proffered by petitioners, the status of the boats as "pleasure" boats, as opposed to "commercial" boats, would control the existence of admiralty jurisdiction. Application of this rule, however, leads to inconsistent findings or denials of admiralty jurisdiction similar to those found fatal to the locality rule in *Executive Jet*. Under the commercial rule, fortuitous circumstances such as whether the boat was, or had ever been rented, or whether it had ever been used for commercial fishing, control the existence of federal-court jurisdiction. The owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found by the court ultimately assuming jurisdiction over the controversy to have been sufficiently "commercial." We decline to inject the uncertainty inherent in such line-drawing into maritime transportation. Moreover, the smooth flow of maritime commerce is promoted when all vessel operators are subject to the same duties and liabilities.
>
> *Foremost v. Richardson, supra*, at page 676.

Creating a pleasure boat exception would also constitute bad public policy. Presumably, a vessel carrying passengers for hire would be a commercial vessel, no matter how large or small the vessel. The owner of such a vessel — one who charged a fee for providing transportation — could limit his liability; the generous host who gave a friend a ride in his yacht could not. Yet, the commercial operator would be more likely, due to regulations and financing agreements, to carry substantial liability insurance. Small boat owners, who, under the respondents' theory would not have the protection of the Act, would be more likely to be uninsured or have low insurance limits.

D. The Limitation Statute Itself Provides A Basis Of Jurisdiction

Limitation of liability is not a part of the traditional or constitutional United States admiralty law. Limitation of liability is a concept and a proceeding first established by statute in 1851. In *Norwich and N.Y. Trans. Co. v. Wright*, 13 Wall. 104, 80 U.S.

104, 20 L.Ed. 585 (1871), this Court acknowledged the statutory basis of a limitation action:

> The court having jurisdiction of the case under and by virtue of the Act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties.
>
> *Id.* at 592.

In *THE HAMILTON*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907), this Court again recognized the statutory basis of the Act's jurisdiction:

> In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so.
>
> *Id.* at 406.

In *Executive Jet, supra*, this Court considered traditional or constitutional admiralty jurisdiction in maritime tort cases. In at least two places the opinion recognizes an independent statutory basis for admiralty jurisdiction. First, this Court held:

> . . . [t]hat unless such a relationship exists, claims arising from airplane accidents are not cognizable in admiralty in the absence of legislation to the contrary.
>
> *Id.* at 268.

Later, this Court averred that:

> . . . Congress is free under the Commerce Clause to enact legislation applicable to all such accidents, whether occurring on land or water, and adapted to the specific characteristics of air commerce.
>
> *Id.* at 274.

1. The Statute Directs That A Limitation Complaint Be Filed In The District Court.

As originally enacted in 1851 the limitation statutes did not specify the court which would enforce or apply them. The only reference to legal action was the provision that ". . . the owner or

owners of the vessel, or any of them, may take the appropriate proceedings in any court. . .," found in 46 U.S.C. § 184. This Court then decided that the district courts were the place for such "appropriate proceedings."

> . . . Congress might have invested the circuit courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State Courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this Court, undoubtedly, has the power to make all needful rules and regulations for facilitating the course of proceeding.
>
> *Norwich & N.Y. Trans. Co. v. Wright, supra*, at 592.

In 1936 Congress amended 46 U.S.C. § 185 to specifically set forth the procedure to be followed by a vessel owner to claim limitation of liability. Congress added the following language to Section 185:

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter . . .

In *Executive Jet*, this Court recognized the power of Congress to enlarge admiralty jurisdiction, *Executive Jet, supra*, at 274. The limitation statute is legislation which enlarges the admiralty jurisdiction. Consequently, the limitation of liability case falls squarely within the "legislation to the contrary" exception to *Executive Jet*.[3]

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[3]Two district courts have recognized the "legislation to the contrary" exception, *In Re Aircraft Disaster Near Bombay*, 531 F.Supp. 1175, 1182-84 (W.D. Wa. 1982), *Friedman v. Mitsubishi Aircraft Intern.*, 678 F.Supp. 1064, 1065 (S.D.N.Y. 1988).

2. Admiralty Jurisdiction In A Limitation Case Does Not Depend On The Nature Of The Claims Filed.

Section 183 of the limitation statute provides that a shipowner may limit his liability for any loss or destruction of property, or any loss, damage or injury by collision or for any act, matter, or thing, loss, damage or forfeiture done, occasioned or incurred without the owner's privity or knowledge. In 46 U.S.C. § 189 it is further provided that the individual liability of a shipowner shall be limited to the proportion of "any or all debts and liabilities that his individual share of the vessel bears to the whole."

Nowhere does the statute say that the only claims subject to limitation are claims which could have been asserted against the owner in admiralty. The statute does not say the owner may limit only against claims arising out of traditional maritime activities. On the contrary, this Court held that the addition of § 189 to the statute in 1884 "was intended to add to the enumerated claims of the old law any 'and all debts and liabilities' not theretofore included" and "whether the liability be strictly maritime or from a tort non-maritime." *Richardson v. Harmon*, 222 U.S. 96, 105-06, 32 S.Ct. 27, 56 L.Ed. 110 (1911). The limitation statute, then, encompasses all claims occurring without the privity or knowledge of the shipowner, whether they be maritime claims or not. *Richardson* expressly decided that the statute allows a shipowner to maintain a limitation action in admiralty to limit his liability for non-maritime torts. *Id.*

This *Amicus* suggests that caution be exercised regarding this Court's reconsideration of the *Richardson* decision. That decision was not a judicial definition of district court jurisdiction. It was an interpretation of a federal statute. The *Richardson* Court held that Congress, in adding § 189, intended to include non-maritime claims within the scope of the Limitation Act. Nothing has happened since the time of the *Richardson* decision to justify or necessitate a re-examination of Congressional intent. To the contrary, Congress has tacitly agreed with this Court's interpretation by periodically amending the Limitation Act without changing the *Richardson* rule.

The correctness of the *Richardson* decision is illustrated by the following: Following *Richardson*, (1) there have been, until recent years, relatively few jurisdictional inconsistencies over the seventy-nine years the federal courts have interpreted jurisdiction under The Act, (2) the federal courts have been able, through the limitation concursus procedure, to join all claimants, whether maritime or non-maritime, in a single, orderly action, with a single common fund, to be appropriately distributed among competing claims, and (3) vessel owners have been able to depend upon the rule that all of their liabilities, whether maritime or non-maritime, may be resolved without being burdened with the uncertainty that some claims, after extensive factual discovery, might be deemed "non-maritime" and therefore not subject to limitation. Overruling *Richardson* at this late date not only would be unwarranted by any accepted principle of statutory construction but would disrupt a pattern of practice to which admiralty courts have been able to apply consistently to create a coherent body of maritime law.

This Court has repeatedly described the broad powers and jurisdiction of the admiralty courts in limitation cases:

> But this limitation of liability proceeding differs from the ordinary admiralty suit, in that by reason of the statute and rules, the court of admiralty has power (citations omitted) to do what is exceptional in a court of admiralty — to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court.
>
> *Hartford Accident & Indemnity Co. v. Southern Pacific*, 273 U.S. 207, 220; 47 S.Ct. 357, 71 L.Ed. 612, 617 (1926).
>
> In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle, but is the result of the statute which

provides for, as well as limits, the liability, and allows it to be proved against the fund.

THE HAMILTON, 207 U.S. 398, 406, 28 S.Ct. 407, 52 L.Ed. 264, 270 (1907).

In fact, the rule is so well established that Gilmore and Black state:

"The hornbook law of the matter today is that § 189: (1) extended the Limitation Act to cover non-maritime claims . . ."

Gilmore and Black, *The Law of Admiralty*, 2d edition at 846.

Under all the foregoing authorities it is clear that the Limitation Act itself confers broader statutory jurisdiction than would exist solely under an analysis of *constitutional* admiralty jurisdiction. The Seventh Circuit erred in failing to recognize this distinction.

3. The Seventh Circuit's Tests Would Deny Vessel Owners Due Process.

In *Executive Jet* and in *Foremost* this Court was deciding which of two court systems (federal court sitting in admiralty or state court) was the proper one in which the plaintiff should have filed his action. In *Executive Jet* the plaintiff's action was dismissed because he made a mistake; he sued in the wrong court. The decision left him free to pursue his remedy in a proper court. By contrast, if the Seventh Circuit's decision stands in this case, petitioner will be unable to litigate his statutory limitation rights in any court.

A petitioner has a right, under the limitation statute, to file an action to claim limitation and to have that right to limitation tried and adjudicated. A state court may not decide whether a shipowner is entitled to limitation. *Ex Parte Green*, 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed. 1212 (1931); *In Re Woods' Petition*, 230 F.2d 197 (2d Cir. 1956). The effect of the Seventh Circuit's decision is to deprive vessel owners of a substantive right without due process, or any process at all. Vessel owners cannot proceed in state court to claim the benefit of the limitation statute. If a vessel

owner is not allowed to assert his claim to limitation in the admiralty court, he will be denied the right given him by the statute; his claims for limitation will be "incapable of execution." As this Court said in *Norwich v. Wright, supra.* "This is never to be done if it can be avoided." *Id.* at 592.

CONCLUSION

Amicus American Auto respectfully submits that the Seventh Circuit, in dismissing for lack of admiralty jurisdiction: (1) misinterpreted or ignored congressional intent as expressed in the Limitation Act and (2) misinterpreted or ignored decisions of this Court defining admiralty jurisdiction, both constitutional and statutory. The decision below should be reversed to avoid confusion and injustice and to promote uniformity in the resolution of maritime disputes.

Dated: March 2, 1990.

Respectfully submitted,

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No. 88-2041

(8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In the Matter of:

The Complaint of Everett A. Sisson, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,

Petitioner,

—v.—

BURTON B. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the petitioner Everett A. Sisson. Petitioner has given consent, but Respondents have not (although they gave such consent with respect to the petition for writ of certiorari), and leave to file must be sought pursuant to rule 37.4.

NATURE OF APPLICANT'S INTEREST

MLA has a very strong interest in the disposition of this case. It is a nationwide bar association founded in 1899, having a membership of about 3400 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, boatowners, charterers, cargo owners, shippers, forwarders, terminal operators, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and others.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for its discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the ninety years of its existence, has sponsored a wide range of legislation dealing with maritime matters and has also cooperated with Congressional committees in the formulation of other maritime legislation.[1]

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1 E.g., Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted* in 6 Benedict on Admiralty, Doc. No. 3-4 at 3-34.1-78.2 (7th ed. .988), see C.F.R. ch. 1, subch, D, Special Note at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073; Shipowner's Limitation of Liability Bill, H.R. 277, 99th Cong., 1st and 2nd Sess. (1985, 1986).

MLA believes uniformity in maritime law is of great importance. This concern has been repeatedly expressed by its membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken to persuade Congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted on April 25, 1975.[2] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[3]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four accepted by the United States Supreme Court.[4]

It is the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The Seventh Circuit Court of Appeals has severely limited admiralty and maritime

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2 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

3 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

4 *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed. 2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

jurisdiction in a way which too narrowly construes the decisions of this Court in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, (1972) and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). In failing to follow *Richardson v. Harmon*, 222 U.S. 96 (1911), it would also have the effect of denying a vessel owner his right to seek limitation of liability, which can properly be sought only in a federal district court. Both aspects of the *Sisson* decision would adversely affect uniform interpretation and application of the admiralty and maritime law.

Moreover, in granting certiorari, the Court requested that the parties brief and argue whether the Court should reconsider its decision in *Richardson v. Harmon, supra*. In connection with that request, MLA considers that *Richardson* should not be disturbed. MLA has reason to believe that respondents would oppose retention of the *Richardson* doctrine and that petitioner, while favoring retention, might not sufficiently address its place and importance in the limitation of liability scheme and in the context of this Court's decisions.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES.

MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, necessarily is different from those of the parties to this particular suit, who are most interested in its outcome as it affects their individual positions. MLA can therefore most effectively treat the need for a decision by this Court which would foster national uniformity and stability on the issues presented.

Dated: March 8, 1990

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petitioner Everett A. Sisson.

QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. § 1333 and Article III, Section 2, of the Constitution.

2. Whether the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*, provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. § 1333.

a. At the Court's request, whether the Court should reconsider the decision in *Richardson v. Harmon*, 222 U.S. 96 (1911).

NATURE OF MLA'S INTEREST

This is stated in the Motion which precedes this Brief.

SUMMARY OF ARGUMENT

The Seventh Circuit construed *Executive Jet* and *Foremost* far too narrowly by limiting the requisite traditional maritime activity to navigation for recreational vessels. Moreover, the Seventh Circuit's tests would be uncertain of application and would impair uniformity. To eliminate the divergence among circuits, we submit this Court should, if practicable, announce a rule for determining admiralty and maritime jurisdiction.

The Seventh Circuit erroneously failed to follow the applicable precedent of *Richardson v. Harmon*, 222 U.S. 96 (1911), under which there is jurisdiction in a limitation proceeding of non-maritime as well as maritime torts. *Richardson* was soundly decided, both in respect of statutory interpretation and in relation to other decisions of this Court. It should not be reconsidered.

The limitation of liability statutes apply to recreational vessels.

ARGUMENT

A. The Seventh Circuit Erroneously Construed *Executive Jet* and *Foremost* Too Narrowly, Thereby Unjustifiably Denying Admiralty and Maritime Jurisdiction.

Prior to 1972 this case clearly would have been within admiralty jurisdiction inasmuch as the casualty occurred on navigable waters. *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866). However, in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), a case involving an airplane crash in Lake Erie, which bore "no relationship to traditional maritime activity," *id.* at 273, this Court held:

> [I]n the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.

Id. at 274. The Court noted that the Death on the High Seas Act might be "legislation to the contrary" in an appropriate case. *Id.* n.26.

In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), a case involving a collision of two pleasure boats on navigable waters, this Court recognized that the requirement that the wrong have a significant connection with traditional maritime activity is not limited to aviation and there is no requirement that the maritime activity be exclusively commercial. Because the "wrong" in *Foremost* involved negligent operation of a vessel on navigable waters, the court believed there was a significant nexus to traditional maritime activity to sustain admiralty jurisdiction. *Id.* at 674. It concluded:

> In light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany

> a jurisdictional test tied to the commercial use of a given boat, we hold that a complaint alleging a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts.

Id. at 677.

In *Sisson*, in view of the many references to "navigation" or "operation" of a vessel in *Foremost*, the Seventh Circuit said there is a reasonable basis to conclude that this Court intended to limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation. 7a-8a.[1] It interpreted *Foremost* to confine admiralty jurisdiction in tort cases either to cases directly involving commercial maritime activity or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially "disruptive impact" on maritime commerce *and* (2) involves the "traditional maritime activity" of navigation. 8a, 11a-12a. It concluded that part (1) of its test had been met in that a fire on a moored vessel could disrupt commercial navigation but, as navigation was not involved, there was no jurisdiction. 8a, 11a-12a.

The Seventh Circuit conceded that it applied a narrow reading to "traditional maritime activity" in limiting its application to cases involving navigation. It admitted that strong arguments exist for a broader interpretation and that, logically, fires aboard moored vessels are as much a traditional maritime concern as errors of navigation. 9a.

The Seventh Circuit also expressed puzzlement at *Foremost's* frequent use of the phrase "traditional maritime activity" in discussions dealing with navigation, but apparently concluded that "traditional maritime activity" is equated

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1 The case is reported as *Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989), but for convenience our page citations to the Seventh Circuit's opinion (and our later references to the limitation statutes) refer to the Petition's Appendix.

only to "maritime commerce," "navigation," or "operation of a vessel." 9a, 11a.

We respectfully submit that the Seventh Circuit relied too much on this Court's focus on "navigation" in *Foremost* which, after all, as a collision case, was necessarily concerned with navigation as the obviously relevant traditional maritime activity. And we suggest that the Seventh Circuit gave excessive weight to only the first sentence of a *Foremost* footnote in determining ultimately to require "navigation" as a necessary "second *Foremost* criterion" requirement for jurisdiction. 8a, 9a. The full footnote from *Foremost* on which the Seventh Circuit relied reads as follows:

> Not every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction. In *Executive Jet*, for example, we concluded that the sinking of the plane in navigable waters did not give rise to a claim in admiralty even though an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity. ***However, when this kind of potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of the boats in this case, admiralty jurisdiction is appropriate.***

457 U.S. at 675, n.5 (emphasis added). In context, the last sentence of the note makes it reasonably plain that "the navigation of the boats in this [*Foremost*] case" was merely the pertinent traditional maritime activity therein, rather than the only one that could possibly suffice, as the Seventh Circuit concluded.

Certainly, the natural meaning of "traditional maritime activity" is broader than the Seventh Circuit utilizes in *Sisson*, as that Court itself recognized. 9a. In the context of *Sisson* numerous traditional maritime activities or concerns, actual and potential, are involved, namely: mooring a vessel; seaworthiness—here involving preventing or detecting fire in a vessel; preventing fire from spreading internally; and pre-

venting its spreading to other vessels or the dock, perhaps by moving the burning vessel or the nearby vessels (possibly arranging towage for such a move or, indeed, salvage services). All of these are clearly traditional maritime activities. *A fortiori*, each of them, e.g., mooring a vessel, is clearly an "activity that bears a substantial relationship to traditional maritime activity," in *Foremost*'s words, italicized above.

Coupled with the Seventh Circuit's conclusion that the fire "could disrupt" commercial navigation [criterion (1)—*Foremost*'s "potential hazard to maritime commerce," *supra*], we submit that any one, or a combination, of the aforesaid traditional maritime activities should have sufficed to ground maritime jurisdiction under *Foremost*, unless the Seventh Circuit was correct when it inferred that "navigation" was a *sine qua non*.

We respectfully submit that, in so inferring, the Seventh Circuit erred. In that respect Judge Ripple would agree. 21a.[2]

B. The Seventh Circuit's Approach Would Be Difficult to Apply, Would Discourage Uniformity, and Should Be Rejected.

The difficulties inherent in the Seventh Circuit's test are illustrated by the *Sisson* opinions themselves—the Panel splitting 2–1 on two issues: (a) whether the fire had a potentially disruptive impact on maritime commerce and (b) whether navigation was the required traditional maritime activity.

Judge Ripple concluded the fire presented no harm to maritime commerce because it occurred in a marina dedicated exclusively to the wharfage of pleasure boats. 21a. But would his view have changed if some of those pleasure boats were regularly chartered out for hire (a commercial activity)? Or if a dock with commercial vessels had been immediately adjacent? Or 200 yards away? Would the size of the fire or the

2 Judge Ripple concurred in the result because he thought the fire presented no harm to maritime commerce, 21a, but, as the majority pointed out, *inter alia*, the fire could have spread from the marina across oil-covered water to threaten or obstruct commercial traffic. 8a.

direction of wind or current be a factor in whether harm was presented?

Such questions illustrate the uncertainty of the *Sisson* approach and its dependence on fortuitous circumstances which would lead to inconsistent findings or denials of admiralty jurisdiction, prejudicial to uniformity. *Foremost* wisely warned against such tests and declined to inject the uncertainty inherent in such line-drawing into maritime transportation. 457 U.S. at 675-676. The *Sisson* approach should be rejected.

C. In View of the Divergence among Circuits on the Question of Jurisdiction it Would Promote Uniformity if this Court would Announce a Clearer Standard for Determining Admiralty and Maritime Jurisdiction.

There is considerable divergence among the Circuits on the test for determining admiralty and maritime jurisdiction.

In *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974), the Fifth Circuit established a four factor test for determining admiralty jurisdiction: (a) the functions and roles of the parties, (b) the types of vehicles and instrumentalities involved, (c) the causation and the type of injury, and (d) traditional concepts of the role of admiralty law. The Seventh Circuit in *Sisson* expressly refused to adopt the "four factor test" although acknowledging its use in the Fourth, Fifth, Ninth and Eleventh Circuits. 8a, n.2.

Without abandoning *Kelly v. Smith*, the Fifth Circuit has added three other indicia "divined from *Executive Jet* and *Foremost*" in determining jurisdiction: (1) impact of the event on maritime shipping and commerce, (2) desirability of a uniform national rule to apply to the matter, and (3) the need for admiralty "expertise." *Molett v. Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987).

The Eighth Circuit probably has given the broadest test of admiralty jurisdiction with respect to pleasure boat torts in

St. Hilaire Moye v. Henderson, 496 F.2d 973, 979 (8 Cir. 1974), *cert. denied*, 419 U.S. 884 (1974), where it stated:

> [T]he operation of a boat on navigable waters, no matter what its size or activity, is a traditional maritime activity to which the admiralty jurisdiction of the federal courts may extend.

Other courts have viewed *Foremost* as requiring consideration of a range of factors, including, but not limited to, navigation. In *Complaint of Sheen*, 709 F. Supp. 1123, 1129 (S.D. Fla. 1989), the Court, in discussing the scope of admiralty jurisdiction, stated:

> Generally, a determination of maritime flavor requires a consideration of three issues: (1) the impact upon maritime shipping and commerce; (2) the desirability of a uniform national rule, and, (3) the need for one central admiralty authority.

The court cited *Foremost* for the foregoing and noted that courts after *Foremost* have found its directives too abstract and have generally followed the guidelines of *Kelly v. Smith*, *supra* 9. *Ibid*.

The Sixth Circuit has criticized *Sisson's* "indefensibly narrow reading of *Foremost*." *In re John Young*, 872 F.2d 176, 179, n.4 (6th Cir. 1989). And in *Sisson* itself, Judge Ripple invited further guidance from this Court. 23a.

We respectfully suggest that, minimally, this Court should rule that the requirement that the wrong have a significant connection with a traditional maritime activity is not limited to navigation as an activity but includes other activities including mooring; and the situation in *Sisson*, where a fire on a moored vessel spread to other vessels and the marina, is within the admiralty and maritime jurisdiction. However, such a ruling could still leave areas of doubt. Accordingly, if a broader test is deemed desirable (and for uniformity's sake we submit that it is) we would suggest: the admiralty and maritime jurisdiction should include all cases where the

"wrong" has a significant connection with any maritime use (active or passive) of a vessel (as defined in 1 U.S.C. § 3, i.e., "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water") on navigable waters. We respectfully submit that such a standard would be appropriate and could be uniformly applied.

D. The Seventh Circuit also Erred in Denying Jurisdiction which is Based on Applicability of the Limitation of Liability Act.

Even if there were no admiralty and maritime jurisdiction under more general principles, there is jurisdiction by virtue of the action being brought under the Limitation of Liability Act, 46 U.S.C. §§ 183 *et seq*.

In *Richardson v. Harmon*, 222 U.S. 96 (1911), this Court held that a vessel owner was entitled to seek limitation of liability with respect to a non-maritime tort, by virtue of what is now 46 U.S.C. § 189. 46a. Accordingly, on the authority of *Richardson*, even if the claims against the ULTORIAN's owner are non-maritime torts, he is still entitled to seek limitation of liability, and the only court in which he may do so is the district court.

Sisson's reasoning, 17a-20a, concerning the changed circumstances due to the nexus requirement having later been added to the locality requirement is beside the point. *Richardson* plainly held that even though, but for the Limitation of Liability Act, there would have been no admiralty jurisdiction (the tort being non-maritime), the Act sufficed to put the case under district court jurisdiction in admiralty. The same principle is true today, even though the general test for admiralty and maritime jurisdiction has been modified.

If there were no ordinary admiralty and maritime jurisdiction, the Limitation of Liability Act would be "legislation to the contrary" of the type referred to in *Executive Jet* quoted *supra* at 3, which would bring the case within such jurisdiction. In any event, we respectfully submit that the vessel

owner's right to seek to limit liability, an admiralty concern (*Executive Jet, supra*), combined with the traditional maritime activities here involved require the exercise of admiralty and maritime jurisdiction in this case.

E. *Richardson v. Harmon*, 222 U.S. 96 (1911), Was Soundly Decided, Has Long Been Followed, and Should Not be Modified.

The Court has requested that the parties address the question whether *Richardson* should be reconsidered. We respectfully submit that reconsideration is not required but, if given, the decision should be left undisturbed.

In considering *Richardson* it is pertinent to review material decisions of this Court which preceded it.

In a leading early case, *Norwich Company v. Wright*, 80 U.S. (13 Wall.) 104 (1871), this Court pointed out that while the limitation act did not prescribe what court should be resorted to, no court was better adapted than a court of admiralty to administer such [limitation] relief, and went on to say:

> Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding.

Id. at 123-24. In thereafter describing the proper course for pleading a limitation action in the District Court so as to effectively bar other actions in state courts, the Court said:

> The Court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the District Courts, we have prepared some rules which will be announced at an early day.

Id. at 125. Those rules were duly issued as part of the admiralty rules, and their current successor, Fed.R. Civ. P. Supplemental Admiralty Rule F, remains in effect. Since *Norwich* the courts have consistently held that limitation of liability proceedings are to be filed in the District Court, in admiralty.

Ex parte Phenix Insurance Co.,118 U.S. 610 (1886), concerned a petition filed in district court by a Wisconsin corporation, which owned a steamer, to limit its liability for damage caused in 1880 to buildings on land in Wisconsin by fire alleged to have been negligently started by sparks from the steamer's smoke-stack. The vessel owner had been sued in the Wisconsin state courts before filing the petition. The question was whether the district court had jurisdiction, inasmuch as under *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865), there was no general admiralty jurisdiction, the tort being consummated on land.

Phenix quoted the Limitation Act as it then stood, without the 1884 amendment (now U.S.C. § 189) which expressly did not apply to liabilities arising before its passage. It found that the Limitation Act did not purport to confer any jurisdiction upon a district court and made provision

> only that the trustee may "be appointed by any court of competent jurisdiction," leaving the question of such competency to depend on other provisions of law.

Id. at 617.

It went on to state:

> As there is no foundation in the general admiralty jurisdiction of the District Court, for its assumption of jurisdiction in this case, *and none in the special provisions of the statute for the limitation of liability*, it is sought to uphold the jurisdiction under the Rules in Admiralty promulgated by this court in reference to the limitation of liability.

Id. at 619, emphasis added. The italicized phrase clearly implies that an express provision for district court jurisdiction in the limitation statute would have satisfied the Court as to jurisdiction.

The Court then reviewed at length the Admiralty Rules it had issued concerning limitation of liability, concluding:

> "There is nothing in any of these rules which purports to enlarge the jurisdiction of the District Courts of the United States as to subject matter. On the contrary, they exclude any such construction, and leave that jurisdiction in admiralty, within the bounds set for it by the Constitution and statutes and the judicial decisions under them. Rule 54 provides that when a vessel is libelled, or her owner is sued, he may file a libel or petition for a limitation of liability "in the proper District Court of the United States, as hereinafter specified." Rule 56 provides that in the proceeding the owner may contest his liability or that of the vessel, independently of the limitation of liability claimed, and that the opposing party may contest the right of the owner either to an exemption from liability or to a limitation of liability. What is the "proper District Court" referred to in Rule 54 and contemplated by Rule 56? It is, the court and only the court, mentioned in Rule 57, namely, the District Court *in which the vessel is libelled, or, if she is not libelled, then the District Court for any district in which the owner "may be sued in that behalf." There is nothing in these rules which sanctions the taking of jurisdiction by a District Court on a petition under the rules,*

> *where that court could not have had original cognizance in admiralty of a suit in rem or in personam to recover for the loss or damage involved.*

Id., at 623-4, emphasis added.

Further, after reviewing limitation cases previously before it and pointing out that all fell within general admiralty jurisdiction, the Court said:

> We are brought, therefore to the conclusion that there is nothing in the Admiralty Rules prescribed by this court which warrants the jurisdiction of the District Court in the present case.
>
> Our decision against the jurisdiction of the District Court is made, *without deciding whether or not the statutory limitation of liability extends to the damages sustained by the fire in question*, so as to be enforceable in an appropriate court of competent jurisdiction. The decision of that question is unnecessary for the disposition of the case.

Id., at 625, emphasis added. This left undecided the question whether the pre-1884 Limitation Act afforded protection against the suits for the fire damage if only an appropriate court could be found. Thus, the narrow grounds of the *Phenix* decision were (a) the lack of any provision in the Limitation Act for assumption of jurisdiction by the district court and (b) the circumstance that Admiralty Rules 54 and 57 provided for district court jurisdiction in terms which, the court concluded, required that limitation proceedings could be instituted only when the vessel had been libelled or her owner sued "in that behalf", the last quoted phrase being apparently interpreted as requiring the possibility of a suit *in personam* in admiralty. This last is a somewhat questionable interpretation in light of the wording of Rule 57, which distinguished between a vessel being libelled in a District Court and the owner being sued in any district, the latter possibly including a suit in a state court within the district, on a non-maritime cause of action.

Moreover, the *Phenix* Court seems to have ignored *Norwich's* reasoning, *supra*, to the effect that state courts did not have the requisite jurisdiction and that the district courts, as courts of admiralty jurisdiction, did. Accordingly, if the wording of the limitation statute had the effect of properly amending the admiralty and maritime jurisdiction by allowing claims in limitation proceedings for vessel torts consummated on land, the district court would have the requisite jurisdiction.

In any event, as noted below, many years after the decision in *Richardson v. Harmon*, *supra*, the statute and rules were amended in ways which met the *Phenix* Court's concerns, rendering them entirely academic today.[3]

Three years after *Phenix*, the Court decided *Butler v. Boston Steamship Co.*, 130 U.S. 527 (1889). That case concerned the stranding and loss of a vessel on navigable waters within a few rods of the coast of Massachusetts. The question presented was whether the Limitation of Liability Act applied to a claim for personal injury and death under a Massachusetts statute. The Court held that the Act did apply.

It observed of the basic limiting provision of the statute [R.S. 4283, now 46 U.S.C. § 183(a)]:

3 In 1936, 46 U.S.C. § 185 was amended to provide that the vessel owner may petition a district court of the United States. 44a-45a. Also the present successor to Rule 57, Rule F(9) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which became effective July 1, 1966 provides in material part:

> (9) VENUE; TRANSFER. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, *if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim.* When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, *but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district* . . . (Emphasis added.)

> . . . nothing can be more general or broad than its terms. The "*liability* . . . shall in no case exceed," etc. It is the liability not only for loss of goods, but for any injury by collision, or for any act, matter, loss, damage or forfeiture whatever, done or incurred.

Id. at 550.

After stating that the law of limited liability applied to cases of death (*id.* at 552), the Court took up the effect of the Massachusetts death statute, as follows:

> We have decided in the case of *The Harrisburg*, 119 U.S. 199, that no damages can be recovered by a suit in admiralty for the death of a human being on the high seas or on waters navigable from the seas, caused by negligence, in the absence of an act of Congress, or a statute of a State, giving a right of action therefor. The maritime law, of this country at least, gives no such right. We have thus far assumed that such damages may be recovered under the statute of Massachusetts in a case arising in the place where the stranding of the City of Columbus took place, within a few rods of the shore of one of the counties of that commonwealth; and had also assumed that the law of limited liability is applicable to that place. Of the latter proposition we entertain no doubt. The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law . . .

Id. at 555 (citations and quotations omitted).

These quotations are believed to express the general, if not unanimous, views of the members of this court for nearly twenty years past; and they leave us in no doubt that, whilst the general maritime law, with slight modifications, is accepted as law in this country, *it is subject to such amendments as Congress may see fit to adopt.* One of the modifications of the maritime law, as

received here, was a rejection of the law of limited liability. We have rectified that. Congress has restored that article to our maritime code. We cannot doubt its power to do this. As the Constitution extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures. It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in *The St. Lawrence*, 1 Black, 522, 526, 527; *The Lottawana*, 21 Wall. 558, 575, 576. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, *with such amendments and modifications as Congress may from time to time have adopted.*

> It being clear, then, that the law of limited liability of shipowners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends—on the sea and the great inland lakes, and the navigable waters connecting therewith.

Id. at 556-7, emphasis added. The Court went on to hold that, the stranding being on navigable waters of the United States, the case was clearly within the admiralty and maritime jurisdiction. The Court continued:

> It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases . . . We have no hesitation, therefore, in saying that the limited liability act applies to the present case, notwithstanding the disaster happened within the technical limits of a county of Massachusetts, and notwithstanding the liability itself may have arisen from a state law. It might be a much more serious question, whether a state law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress had created such a liability. On this subject we prefer not to express an opinion.

Id. at 557-8.

Thus, *Butler* held that the Limitation Act, as part of the maritime law, applied to a death claim which may have arisen under a state law although the general maritime law, in itself, gave no right of recovery in a death case.

Subsequently, in *The Hamilton*, 207 U.S. 398 (1907), the Court dealt with the question whether a Delaware death statute applied to a claim for death on the high seas, arising purely in tort, in proceedings in admiralty. The claims were presented in limitation of liability proceedings following a high seas collision between two ships belonging to Delaware corporations. At the time, death claims occurring on the high seas could not be recovered under the general maritime law.

After holding that Delaware had power to enact such legislation in respect of its corporations, the Court said:

> The first question, then, is narrowed to whether there is anything in the structure of the National Government and under the Constitution of the United States that takes away or qualifies the authority that otherwise Delaware would possess—a question that seems to have been considered doubtful in *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527, 558. It has two branches: First, whether the state law is valid for any purpose, and, next, whether, if valid, it will be applied in the admiralty. We will take them up in order.

> The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to "all cases of admiralty and maritime jurisdiction." Art. 3, § 2; 130 U.S. 557. The doubt in this case arises as to the power of the States where Congress has remained silent.

Id. at 403-4.

After holding the Delaware statute valid (*id.* at 404-5) the Court continued:

> We pass to the other branch of the first question: whether the state law, being valid, will be applied in the admiralty. Being valid, it created an *obligatio*, a personal liability of the owner of the Hamilton to the claimants. *Slater v. Mexican National R.R. Co.*, 194 U.S. 120, 126. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way . . . In this case the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and it has done so. That fund is being distributed. In such circumstances all claims to which the admiralty does not deny existence must be recognized, whether admiralty liens or not. This is not only a general principle, *Andrews v. Wall*, 3 How. 568, 573; *The J. E. Rumbell*, 148 U.S. 1, 15; Admiralty Rule, 43; *Cargo Ex Galam*, 2 Moore P. C. (N.S.) 216, 236, *but is the result of the statute, which provides for, as well as limits the liability, and allows it to be proved against the fund.* The *Albert Dumois*, 177 U.S. 240, 260. See *Workman v. New York*, 179 U.S. 552, 563.

Id. at 405-6, emphasis added.

Thus, prior to the decision in *Richardson*, *supra*, this Court had held that claims not falling within the general maritime jurisdiction could be brought in a limitation of liability proceeding. And, as indicated in the italicized portion of the

passage from *The Hamilton*, *supra*, a ground for this is found in the statute, presumably R.S. § 4284, now § 184 (see 44a), which provided for the owners of damaged property receiving compensation from the limitation fund.

Richardson v. Harmon, 222 U.S. 96 (1911) was concerned with damage inflicted by a vessel on a draw-bridge, a non-maritime tort. In holding that the vessel owner was entitled to seek limitation in respect of such damage, the Court relied principally on the language of the June 26, 1884 amendment to the Act, now 46 U.S.C. § 189, 46a. Quoting extensively from *Butler*, the Court reasoned:

> The legislation is in *pari materia* with the act of March 3, 1851, 9 Stat. 635, c. 43, as carried into the Revised Statutes as §§ 4283 *et seq.*, and must be read in connection with that law, and so read, should be given such an effect not incongruous with that law so far as consistent with the terms of the later legislation. The former law embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts. The section under consideration includes debts, save wages of seamen and liabilities of an owner incurred prior to the passage of the law. The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. The same public policy is declared to be the motive of the act of which this section is a part. True, a liability may arise out of a contract as well as from a tort. But a liability *ex contractu* is included *ex vi termini*, and the addition of the words "and liabilities" would be tautology unless meant to embrace liabilities not arising from "debts." . . . In *Butler v. Steamship Company*, 130 U.S. 527, 549, 553, the words "the liability of the owner . . . shall in no case exceed," etc., were construed as extending to any liability "for any act, matter, loss, damage or forfeiture whatever, done or incurred, . . ." Upon this interpretation of § 4283,

it was held that liabilities of the owner for injuries to persons were included in the limitation, as well as injuries to goods. Referring to the eighteenth section of the act of 1884, which did not apply in that case because the injury occurred before its passage, the court said (p.553), it "seems to have been intended as explanatory of the intent of Congress in this class of legislation. It declares that the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. The language is somewhat vague, it is true; but it is possible that it was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without the privity or knowledge of the owner. But it is unnecessary to decide this point in the present case. The pendency of the proceedings in the limited liability cause was a sufficient answer to the libel of the appellants."

Id. at 103-5. The *Richardson* Court continued:

> We therefore conclude that the section in question was intended to add to the enumerated claims of the old law "any and all debts and liabilities" not theretofore included. This is the interpretation suggested in *Butler v. Steamship Co.*, *supra*. That the section operates as such an amendment of the existing law and not as a repeal of the qualifications found in that law, is the view adopted by three Circuit Courts of Appeal . . . (citations omitted)
>
> Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts.

Id. at 105-6.

The Court's only reference to *Phenix* came at the conclusion of the opinion and it merely pointed out that the liability in *Phenix* arose before the passage of the 1884 Act which excluded liabilities arising before its passage. There was no discussion of *Phenix's* concern for the lack of explicit jurisdictional reference to the district court under the terms of the statute or Admiralty Rules, as discussed *supra*.

We submit that, in *Butler* and *Hamilton*, *supra*, this Court had already determined that claims not within the general maritime jurisdiction could be brought in a limitation proceeding, based on the Limitation Statute's broad language affording the shipowner the right to seek limitation against a wide variety of claims, which could be maritime or non-maritime. The unanimous *Richardson* decision was a logical adaptation of the *Hamilton* and *Butler* principles to a different species of non-maritime tort, in keeping with the practical common-sense approach of *Norwich*, *supra*.

In short, the rationale of *Phenix* becomes irrelevant if one reasons that one effect of the wording of the Limitation Act was to make a marginal adjustment in admiralty and maritime jurisdiction by allowing non-maritime claims in a limitation proceeding. And the result of *Hamilton*, *Richardson*, and other cases was practical as well. Ordinarily the great bulk of claims arising in the limitation context would be purely maritime. Some proceedings might involve both maritime and non-maritime claims; and it would defeat the objectives of *concursus* and a single fund for all claims to have proceedings in different courts. Even in those cases such as *Richardson* where the damage was inflicted solely on land the expertise of an admiralty court is useful in determining the shipowner's liability and whether it is entitled to limit that liability.

We submit that *Richardson* was soundly and rightly decided.

The passage of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, has substantially reduced the number of cases which would require invocation of the *Richardson*

doctrine. Perhaps the largest group of such cases is that represented by *Sisson*, i.e., recreational boat accidents involving more than one claimant [4] and sufficiently serious to occasion a limitation proceeding—and in which the Court considers the wrong does not have a significant connection with traditional maritime activity. If, as we have submitted, this Court should adopt a broader view of "traditional maritime activity" than the *Sisson* Court, whatever need there is to apply the *Richardson* principle would be concomitantly reduced.

If it were argued that allowing limitation for claims having no significant relationship to traditional maritime activity is unnecessary for merchant marine interests, we would point out that one purpose of the Limitation Act "was to encourage ship-building and to induce capitalists to invest money in this branch of the industry." *Norwich*, *supra*, at 121. The building of recreational craft is an important segment of the "ship-building" industry today and, as discussed below, pleasure craft are clearly included in the Limitation Act.

We submit that there is a strong federal interest in activity of vessels of all description on the navigable waters of the United States, which goes beyond interest in active navigation alone and should certainly include such cases as *Sisson*.

The broad language of the Limitation Act is obviously not limited to maritime claims. As we have seen, *supra* 13, even *Phenix* expressly refused to decide whether the limitation statute extended to the fire damage on land in that case. And this Court subsequently recognized the breadth of the statutory language in *Butler*, *Hamilton*, *Richardson*, and more recent cases, e.g., *Just v. Chambers*, 312 U.S. 383, 385-6 (1940) and *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207, 215-6 (1927).

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4 It is important to note that the limitation injunction must be dissolved where only one claim is asserted against the shipowner, although the district court retains jurisdiction over all matters affecting the right to limit liability. *Langnes v. Greene*, 282 U.S. 531 (1931). This would permit many liability trials in state courts in single claimant cases.

Perhaps the most compelling argument against overruling or modifying *Richardson*, in addition to avoiding frustration of the language of the limitation statute, would be the consequent impairment in some cases of the district court's ability completely to dispose of a "many cornered controversy" in a single proceeding. *Just v. Chambers*, *supra* 22, at 385-7.

Finally, the principle of *stare decisis* applies here. *Richardson* and similar decisions have been accepted as correctly interpreting the limitation statutes for many years. As was said in *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363 (1989):

> . . . we have held that "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. See, *e.g.*, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424, 106 S.Ct. 1922, 1930-31, 90 L.Ed.2d 413 (1986); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S.Ct. 2061, 2069-70, 52 L.Ed.2d 707 (1977).

Id. at 2370.

Richardson has been the law for nearly eighty years. Congress has not seen fit to alter this Court's construction of the statute, despite revisiting the subject of limitation of liability extensively in 1936. Moreover, Congress' enactment of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, in 1948, extending admiralty and maritime jurisdiction to all cases of damage to persons or property on land caused by a

vessel on navigable water, while unrelated to *Richardson*, was fully consistent with it.

We respectfully submit that *Richardson* should not be disturbed.

F. In Addition to the Wording of the Statutes and Case Law, Legislative History Confirms that the Limitation Statutes Apply to Pleasure Craft.

An underlying issue concerns whether the limitation statutes apply to pleasure craft. While the statute is clear and the leading cases cited by the parties support inclusion of pleasure craft, we think it helpful to point out a material part of the Senate Report No. 2061 on Limitation of Shipowners' Liability, May 12, 1936, 74th Congress, 2d Session (Calendar No. 2165) which states:

> The proposed subsection (f) of section 4283 [§ 183, 43a-44a] excludes from the provisions of subsections (b), (c), (d), and (e), pleasure yachts, . . . nondescript self-propelled vessels . . . [and other vessels], even though they may be seagoing vessels within the meaning of section 4289 of the Revised Statutes [§ 188, 46a]; . . . The proposed subsections (b), (c), (d), and (e) of section 4283 are made to apply only to seagoing vessels, but it was the opinion of the committee that even though the above-described vessels should be seagoing vessels, they should be exempted from the operation of the $60-per-ton minimum liability and *left under subsection (a) of section 4283, i.e., the old law*. It is not intended by the proposed subsection (f) to change in any way, by implication or otherwise, the meaning of the term "seagoing vessels", or the term "vessels used on lakes or rivers or in inland navigation", as used in section 4289, but only to limit the meaning of the term "seagoing vessels" for the purposes of the $60-per-ton minimum liability, and the provisions relating thereto.

Id. at 5, emphasis added.

The foregoing language clearly demonstrates the intent of Congress that pleasure yachts and nondescript self-propelled vessels should be included in § 183(a). In *Petition of Colonial Trust Company*, 124 F. Supp. 73 (D. Conn. 1954), the court suggested reasons:

> There is reason behind a policy of encouraging the building of pleasure craft as well as larger commercial vessels. It gives additional work to shipyards whose men are thus enabled to preserve their skills; it gives experience to those who operate the vessel on the seas and in navigable waters and, as occurred in the early part of World War II, it provides a source of small craft available for patrol and picket duty in guarding harbors and important water-front facilities in time of war or other emergency.

Id. at 75.

In any event, Congressional intent is clear.

CONCLUSION

We respectfully urge this Honorable Court to reverse the judgment of the Court of Appeals. We most respectfully request that, in doing so, this Court fashion, if practicable, a standard for admiralty and maritime jurisdiction which will promote uniformity.

Dated: March 8, 1990

Respectfully submitted,

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No. 88-2041

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

In the Matter of:

The Complaint of EVERETT A. SISSON, as owner of the motor yacht the ULTORIAN, for exoneration from or limitation of liability,

EVERETT A. SISSON,
Petitioner,

vs.

BURTON R. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF HATTERAS YACHTS DIVISION OF GENMAR INDUSTRIES, INC. AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITES

Statutes

Rules

Other

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MOTION BY HATTERAS YACHTS DIVISION OF GENMAR INDUSTRIES, INC., FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

Hatteras Yachts Division of Genmar Industries, Inc. ("Hatteras") respectfully moves this Court for leave to file the accompanying *Amicus Curiae* brief in support of Respondents. Respondents have consented to leave for this purpose but Petitioner has not. Therefore, leave to file must be sought pursuant to Supreme Court Rule 37.4.

NATURE OF HATTERAS' INTEREST

There are reportedly more than 17 million recreational watercraft owned in the United States.[1] Hatteras is a domestic manufacturer of many of these watercraft, which are operated both within and outside of the waters of the United States. Hatteras is also a party to litigation commenced in the United States District Court for the Northern District of California [limitation petition by American Auto, Inc. ("American Auto") dismissed, and reported at 1989 AMC 1489 (N.D. Cal. 1989), appeal now pending before the United States Court of Appeals for the Ninth Circuit (No. 89-15689)]. In that litigation, Hatteras is adverse to *Amicus* American Auto. American Auto's motion for leave to file an *Amicus Curiae* brief in this case was granted on March 26, 1990.

RELEVANT MATTERS RAISED BY THIS AMICUS BRIEF WHICH MAY NOT BE ADDRESSED BY THE PARTIES

Hatteras believes that there are important legal questions of admiralty jurisdiction raised by Petitioner Sisson in this case which will affect the status of American Auto's appeal in the Ninth Circuit, and more importantly, directly impact upon the recreational watercraft industry in the United States. If this Court were to rule that admiralty jurisdiction exists to sustain a petition under the Limitation of Liability Act, 46 U.S.C. § 181 et seq., in a case involving a fire aboard a purely non-commercial watercraft, which does not affect maritime commerce and which does not involve the traditional maritime activity of navigation, the effect will undoubtedly be to expand the jurisdiction of the federal courts to encompass routine products liability claims in contexts beyond which currently exist. More importantly, the decision in this case will directly impact upon the interest of the states in providing a forum and, to the appropriate extent, in applying their own laws to regulate conduct within their borders. As such, a fundamental question raised by Sisson's brief is whether there

[1] Department of Transportation, *National Transportation Statistics Annual Report*, at 35 (1989)

exists any ascertainable federal interest which justifies the frustration of the states' legitimate interests.

Finally, in granting Sisson's Petition for Writ of *Certiorari*, this Court questioned whether *Richardson v. Harmon*, 222 U.S. 96 (1911), should be reconsidered. Briefs filed by Sisson as well as its supporting *Amicus* parties, American Auto and Maritime Law Association of the United States, argue that *Richardson* does not have to be reconsidered. Hatteras believes that Respondents will contend that *Richardson* must be overruled. Hatteras, however, believes that it is not necessary to overrule *Richardson v. Harmon*, but that it should be revisited and considered in light of the historical evolution of admiralty jurisdiction evidenced by this Court's decisions in *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972) and *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982). When considered in that light, Hatteras submits that *Richardson v. Harmon* remains viable precedent, although the scope of its precedential value is narrowed. Hatteras believes that the foregoing points will not otherwise be brought to the attention of the Court.

As a domestic manufacture of recreational yachts, and as a party defendant to similar litigation now pending in the United States Court of Appeals for the Ninth Circuit, Hatteras has a unique and vital interest in the outcome of this case. Hatteras believes that it can materially contribute to a resolution of the important legal questions of jurisdiction under the Limitation of Liability Act and in striking a balance between the necessary role of the federal courts in promoting uniformity of law and the legitimate role of state courts in resolving local controversies. A decision which promotes stability and fosters predictability will materially advance the interests of pleasure yacht manufacturers and owners.

Respectfully submitted,

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Petitioner,

vs.

BURTON R. RUBY, FIREMAN'S FUND INSURANCE COMPANY, and PORT AUTHORITY OF MICHIGAN CITY, Claimants,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF HATTERAS YACHTS DIVISION OF GENMAR INDUSTRIES, INC. AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

Hatteras Yachts division of Genmar Industries, Inc. ("Hatteras") respectfully submits this brief as *Amicus Curiae* in support of Respondents.

QUESTIONS PRESENTED

1. Whether a fire on board a non-commercial vessel docked at a recreational marina on navigable waters bears a significant relationship to traditional maritime activity in order to bring it

within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. § 1333 and Article III, Section 2, of the Constitution.

2. Whether the Limitation of Liability Act, 46 U.S.C. § 181, et seq., provides a source of admiralty jurisdiction separate and apart from jurisdiction under 28 U.S.C. § 1333.

3. Whether the Court should reconsider the decision in *Richardson v. Harmon,* 222 U.S. 96 (1911).

NATURE OF HATTERAS' INTEREST

This is stated in the Motion preceding this brief.

SUMMARY OF ARGUMENT

The Seventh Circuit properly construed *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972), and *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982), to limit federal admiralty tort jurisdiction in cases involving non-commercial, or recreational, vessels to accidents which affect maritime commerce and involve activities such as navigation, and as to which legal rules requiring uniform application are required. The decision below conforms with the historical and legislative grant of federal admiralty jurisdiction and recognizes the legitimate interests of the states in providing forums to their residents and in regulating local controversies. The decision does not violate the national interest in promoting uniformity of maritime law.

The Limitation of Liability Act, 46 U.S.C. § 181, et seq. is not a jurisdictional statute, but is instead remedial. Mere ownership of a vessel does not confer jurisdiction on a federal court to entertain an action to limit liability. Logic and case precedent mandate that the elements of admiralty jurisdiction must be satisfied to sustain a limitation action in federal court.

Richardson v. Harmon, 222 U.S. 96 (1911), must be revisited and clarified in light of subsequent legislation as well as later decisions by this Court. *Amicus* Hatteras submits that *Richardson* should be read to stand for the limited proposition that the 1884 amendment to the Limitation Act extends the shipowner's remedy under the Act to provide for limitation of non-maritime as well as maritime claims. When so viewed, particularly in light of legislative and decisional developments, the case does not extend admiralty's jurisdiction.

The precise legal issues faced by the *Richardson* Court would not arise today, for the claim that was necessarily characterized as non-maritime in that case would now be characterized as maritime by virtue of The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740. Moreover, admiralty jurisdiction to support a limitation petition in *Richardson* would exist today when measured by the decisions in *Executive Jet* and *Foremost* because the vessel was commercial and the allison with the bridge impacted upon maritime commerce. Thus, it is not necessary to reconsider the decision, but only to revisit and clarify it as part of the evolution of admiralty jurisdiction.

If, however, this Court concludes that *Richardson* necessarily held that the Limitation Act implicitly confers jurisdiction, then the decision must be reconsidered in light of subsequent developments. The claims in *Richardson* which were characterized as non-maritime are now considered to be maritime, and this Court now requires that a "nexus" as well as "situs" requirement be met to sustain jurisdiction. Under current circumstances, an implicit finding of jurisdiction is no longer necessary and, consistent with principles requiring explicit grants of jurisdiction, the Limitation Act cannot be construed as independently conferring admiralty jurisdiction.

ARGUMENT

A. The Seventh Circuit's Decision Conforms With The Historical Interest Of The Federal Maritime Law In Uniformity On Matters Affecting Maritime Commerce And Preserves To The States Their Legitimate Interest In Resolving Localized Controversies.

The decision of the Seventh Circuit is based upon an interpretation of the decision of this Court in *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982). That case involved a collision between two pleasure boats on navigable waters. The district

court had dismissed the complaint for lack of subject matter jurisdiction in admiralty. The court of appeals reversed. This Court, relying on its decision in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972), affirmed, holding that the potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that a collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce. *See Foremost,* 457 U.S. at 675. By way of example, this Court posited a hypothetical situation involving the collision of two pleasure boats at the mouth of the St. Lawrence Seaway. In such an event, there would be a substantial effect on maritime commerce, without regard to whether either boat was actively, or had been previously, engaged in commercial activity. *Id.* Thus, admiralty jurisdiction would be upheld.

As is pointed out by the dissenting opinion in *Foremost,* however, when pleasure rather than commercial vessels are involved, the issue is essentially one of balancing the separate interests of the desire for national uniformity in maritime matters on one hand and the rights of the states to regulate matters within their borders on the other. *See* 457 U.S. at 677-78. On the facts of *Foremost,* the majority of the Court struck the balance in favor of upholding admiralty jurisdiction. The dissent, of course, would have struck a different balance.

Against that background, the *Sisson* court was faced with a situation involving a fire aboard a pleasure yacht moored at a marina on navigable waters. Interpreting *Foremost,* the Seventh Circuit cast the issue as whether those facts bore a significant relationship to traditional maritime activity so as to give rise to admiralty jurisdiction.[1] Appendix of Petition at 4a-5a. The court addressed the question by reasoning that federal admiralty jurisdiction should be upheld in all cases directly involving commercial activity as well as in those involving exclusively non-commercial activity in which the wrong (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation. Appendix of Petition at 8a. Because the non-commercial yacht in Sisson was moored and not in navigation, the Seventh Circuit concluded that the claimant in limitation had not established the requisite "nexus" with traditional maritime activity, and therefore admiralty jurisdiction was lacking. Appendix of Petition at 9a-14a.

[1] The case is reported as *In The Matter Of The Complaint Of Sisson,* 867 F.2d 341 (7th Cir. 1989). The page citations used in this brief refer, however, not to the reported opinion but to the Appendix of the Petition for Writ of Certiorari filed in this Court (hereinafter "Appendix of Petition").

In reaching its conclusion, the Seventh Circuit acknowledged that it was attempting to determine the limits of the scope of "traditional maritime activity." *Amicus* Hatteras submits that the Seventh Circuit was correct in its determination. Clearly, a maritime casualty involving navigational error, even with non-commercial watercraft, bears a direct and close relationship to traditional maritime activity.

As the Seventh Circuit noted, however, the delimiting process is not confined to deciding simply what are the traditional aspects of maritime activity. Appendix of Petition at 9a-10a. Instead, the process involves determining which aspects of maritime activity are worthy of federal concern. Appendix of Petition at 10a. As *Foremost* makes clear, a federal interest is served by having a uniform standard of conduct with respect to navigation on navigable waterways. *See* 457 U.S. at 675. Having uniform rules of the road—applicable to pleasure craft as well as commercial vessels—promotes the smooth flow of maritime commerce. If pleasure boats followed rules of the road that were different from those followed by commercial vessels, the disruption of maritime commerce could be substantial. Thus, the balance is struck in such instances in favor of uniformity. The interests of the states are correspondingly subordinated.

The petitioner in Sisson as well as his supporting *Amicus* parties point out that fire at sea is regarded as one of the greatest dangers facing mariners. They then assert that fires at sea also have a significant connection with traditional maritime activity, and thus, a fire aboard a pleasure yacht on navigable waters should fall within the admiralty jurisdiction, despite the absence

of any impact on maritime commerce. As the *Sisson* court pointed out, however, the application of uniform fire safety laws to pleasure craft is not intended to promote the flow of maritime commerce. Appendix of Petition at 10a. Moreover, as Mr. Justice Powell pointed out in his dissenting opinion in *Foremost*, the fact that the federal courts may not have admiralty jurisdiction over certain claims does not mean that federal law will not be applied by state courts where pertinent and controlling. *See* 457 U.S. at 682. Nor does it mean that this Court will lose the opportunity to ensure that federal law is applied by the state courts in a rational and uniform way. *Id.* What it means, however, is that the issue of what law to apply is a "choice of law" issue and does not mandate federal court jurisdiction.

Thus, in the absence of the need to promote the smooth flow of maritime commerce, the balance ought to be struck in favor of allowing the respective states to regulate matters within their borders, so long as they do so consistent with the federal laws in force. Where pertinent, state courts must apply federal law as well as local uniform rules of conduct. *See Foremost*, 457 U.S. at 682 (Powell, J., dissenting), *citing Testa v. Katt*, 330 U.S. 386 (1947). The fact that state courts in some instances must apply federal law, however, is entirely distinct from the issue of federal subject matter jurisdiction.

Amicus Hatteras submits that the Seventh Circuit's two-pronged test strikes the proper balance between the potentially completing interests of national uniformity in maritime matters and federalism. Where commercial activity is involved, admiralty jurisdiction exists. Even where non-commercial vessels are involved, admiralty jurisdiction exists provided the incident has a potentially disruptive effect on maritime commerce and the traditional maritime activity of navigation is involved. In the absence of either situation, the interests of the states in regulating recreational boating activity within their borders predominate.

B. To Invoke The Protection And Benefits Of The Limitation Of Liability Act, A Shipowner Must Independently Establish Admiralty Jurisdiction; The Act Itself Is Not Jurisdictional.

Petitioner Sisson and his supporting *Amicus* parties contend that the Limitation of Liability Act confers jurisdiction in the district court separate and apart from the concept of traditional admiralty jurisdiction. The Seventh Circuit rejected that contention, noting that the Act is not cast in jurisdictional terms and reasoning that, as a matter of logic and policy, jurisdiction cannot be sustained in a limitation proceeding unless the locality and nexus requirements are satisfied. *Amicus* Hatteras submits that the Seventh Circuit was correct in that conclusion.

Judicial power is derived from constitutional authority and, in the usual case, by enabling legislation. Jurisdiction should not be implied. 3A Sutherland, *Statutory Construction*, § 67.03, at 354 (4th Ed. 1986); *See also United States v. W.H. Mosley Co.*, 730 F.2d 1472, 1475 (Fed. Cir. 1984). Instead, as this Court noted in *Hallstrom v. Tillamook County*, ___ U.S. ___, 110 S.Ct. 304, 308 (1989), reh. denied ___ U.S. ___, 110 S.Ct. 761 (1990), "the starting point . . . [in determining whether a statute confers jurisdiction] . . . is the language of the statute itself" *(citing Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

No language in the limitation statute itself confers subject matter jurisdiction. On the contrary, 46 U.S.C. § 185 provides, in pertinent part, that a vessel owner ". . . may petition a district court of the United States *of competent jurisdiction* for limitation of liability . . . "(emphasis added). These words provide express recognition that the district court in which the petition for limitation is filed must have jurisdiction; otherwise, the referenced language is rendered meaningless and constitutes mere surplusage. Courts, when construing statutes, are obliged to give effect, if possible, to every word Congress used. *See Reiter v. Sonotone Corporation*, 442 U.S. 330, 339 (1979), *citing United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Congress' use of the phrase "of competent jurisdiction" must be construed to require

the independent establishment of admiralty jurisdiction before the Act can be invoked.

In contrast to the language of the Limitation Act, Congress has, in fact, made express grants of subject matter jurisdiction in other maritime statutes. *See, e.g.*, 45 U.S.C. § 56 (Federal Employer's Liability Act) incorporated by reference in the Merchant Marine Act of 1920 (Jones Act), 46 U.S.C. § 688; *see also* 46 U.S.C. § 951 (Preferred Mortgage Foreclosure Act); *and see* 46 U.S.C. § 761 (Death on the High Seas Act). Had Congress intended to grant subject matter jurisdiction under the Limitation Act, it could have done so. That it did not must be deemed an expression of its intent to require the establishment of a basis of jurisdiction apart from the Act.

Support for the conclusion that the Limitation Act itself does not confer admiralty jurisdiction upon a district court is also found in the evolution of the Act and the decisions of this Court construing the Act. In *Ex Parte Phenix Insurance Company*, 118 U.S. 610 (1886), this Court construed the original Limitation Act of 1851. In that case, a steamer allegedly emitted sparks that caused a fire and damage to buildings as the vessel passed by on a navigable waterway. The shipowner petitioned for limitation of liability. The Limitation Act, at the time, did not contain the language now found in 46 U.S.C. § 189, limiting the liability of shipowner to "... any or all debts and liabilities ..."[2] In addition, the then existing rule of law, as established by *The Plymouth*, 70 U.S. (3 Wall.) 10 (1866), was that admiralty jurisdiction was lacking unless the wrong was wholly committed on navigable waters; the consummation of the wrong on land was insufficient to establish admiralty jurisdiction. Under the facts presented and the existing law, this Court held that the district court lacked subject matter jurisdiction to consider the shipowner's petition. The Court found nothing

> ... in any of the decisions of this court on the subject of the limitation of liability, which supports the view that a district court can take jurisdiction in admiralty of a petition for a limitation of liability where it would not have had cognizance in admiralty originally of the cause of action involved. *In Re Phenix*, 118 U.S. at 624.

[2] When enacted, what is now § 189 of Title 46 U.S.C. was § 18 of the Shipping Act of 1884. Rather than refer to the Shipping Act citation, this brief will refer to "§ 189" throughout.

The facts of *In Re Phenix*, combined with the then existing state of the law, provided this Court with the opportunity to conclude that the Limitation Act provided an independent basis of jurisdiction. It did not do so, however.

Nor did this Court seize the opportunity in subsequent cases to conclude that the Limitation Act is jurisdictional. For example, in *Butler v. Boston & S.S.S. Co.*, 130 U.S. 527 (1889), a shipowner filed a petition to limit various claims, including some relating to personal injuries and deaths. The libellants asserted that the Limitation Act was not applicable to those personal injury and death claims. This Court rejected that assertion and concluded that the law of limited liability of shipowners is

> ... necessarily co-extensive with that of the general admiralty and maritime jurisdiction, and that by settled law of this country extends wherever public navigation extends ... *See* 130 U.S. at 557.

It is significant that this Court opted to conclude that the Act was *co-extensive* with admiralty jurisdiction rather than that it established a separate and independent basis for it.

By the time the issue again reached this Court, the Limitation Act had been amended to include what is now 46 U.S.C. § 189, entitling the shipowner to limit his liability to "any and all debts and liabilities." In *Richardson v. Harmon*, this Court held that the owners of a vessel that had allided with a drawbridge were entitled to limit their liability against the claim for damage to the bridge. Had Congress not amended the Limitation Act, the situation would have been identical to that in *In Re Phenix*. This Court concluded, however, that for effect to be given to the phrase "any and all ... liabilities ...", the Limitation Act, as amended, must be deemed applicable to non-maritime claims.

Petitioner Sisson and his supporting *Amicus* parties assert that *Richardson v. Harmon* held that the Limitation Act provides a

separate and independent basis of admiralty jurisdiction. *Amicus* Hatteras submits, however, that such an interpretation is entirely unwarranted and simply reads too much into the case. The *Richardson* Court did not state the issue in jurisdictional terms and did not conclude that the Limitation Act itself provided an independent jurisdictional basis. Instead, this Court devoted its analysis to an interpretation of whether the 1884 amendment to the Act provided a remedy to a shipowner against non-maritime claims. In fact, the only difference between the situations presented in *Phenix* and *Richardson* was that the 1884 amendment to the Limitation Act had taken effect in the period between the two decisions. That amendment merely specified that the shipowner could limit his liability against "any or all debts and liabilities". Nothing in the wording of that amendment could be construed as an express jurisdictional grant. Congress therefore must have intended that it merely extended a remedy to the shipowner, and this Court in *Richardson* so held.

More recently, the Courts of Appeal for the Eighth, Eleventh and, now, Seventh Circuits have each considered the specific issue of whether the Limitation Act provides a separate and independent basis of jurisdiction in admiralty. Each has ruled that the Limitation Act is not jurisdictional; instead, to invoke the Act, there must exist admiralty jurisdiction under 28 U.S.C. § 1333. *See Three Buoys Houseboat Vacation USA, Ltd v. Morts,* 878 F.2d 1096 (8th Cir. 1989) *reh. denied en banc* 1989 U.S. App. LEXIS 15012 (1989), *petition for cert. filed* (1989), *Lewis Charters, Inc. v. Huckins Yacht Corp.,* 871 F.2d 1046 (11th Cir. 1989), and *In The Matter Of Sisson,* 867 F.2d 341 (7th Cir.) *reh. denied* 1989 U.S. App. LEXIS 4041 (1989), *cert. granted* ____ U.S. ____, 110 S. Ct. 863 (1989). Just as courts have consistently ruled that the territorial scope (situs) of the Act is limited to navigable waters (*Butler v. Boston & S.S.S. Co.*),[3] the petitioning

[3] *See also In the Matter of Stevens,* 341 F. Supp. 1404 (N.D. Ga. 1965), *MERCURY SABRE,* 227 F. Supp. 135 (D.Or. 1964), *Petition of E. H. Keller,* 149 F. Supp. 513 (D. Minn. 1956), *In Re RIVER QUEEN,* 275 F. Supp. 403 (W.D. Ark. 1967), *aff'd.* 402 F.2d 977 (8th Cir. 1968), *In Re Howser's Petition,* 227 F. Supp. 81 (W.D. N.C. 1964), *In Re Madsen's Petition,* 187 F. Supp. 411 (N.D. N.Y. 1960).

shipowner must now also establish a nexus with traditional maritime activity. In the case of a non-commercial vessel, that "nexus" requires a potential impact on maritime commerce as well as an integral involvement with maritime navigation. If both are demonstrated, national uniform interpretation of maritime law is mandated.[4]

Contrary to the position taken by Petitioner Sisson as well as the supporting *Amicus* parties, there is nothing inconsistent or inequitable in allowing various categories of claimants to pursue statutory maritime causes against a shipowner while denying a shipowner access to the umbrella of protection afforded by the Limitation Act in the event admiralty subject matter jurisdiction is wanting. Thus, an employee who qualifies as a seaman under the Merchant Marine Act of 1920 (Jones Act, 46 U.S.C. § 688) may bring an action in federal court against his employer even though the employer lacks standing to seek limitation since it is not a shipowner. *See Mahramas v. American Export Isbrandsen Lines, Inc.,* 475 F.2d 165 (2d Cir. 1973). Similarly, the owner of aircraft may be subjected to wrongful death suits under the Death on the High Seas Act (46 U.S.C. § 761), but be denied the right to invoke the Limitation Act for the same reason. *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978).

[4] Sisson and *Amicus* American Auto's reliance on cases which interpret the Limitation Act to include purely recreational vessels, is inapposite. The point is not whether the benefits of the Limitation Act extend to purely non-commercial vessels, but rather whether the petitioning shipowner must satisfy admiralty subject matter jurisdiction. Moreover, these cases either expressly or inferentially mandate that the vessel owner must satisfy the situs and (now) nexus tests for jurisdiction. *See e.g. In the Matter of Guglielmo,* ____ F.2d ____, 1989 U.S. App. LEXIS 2881 (2nd Cir. 1989); *Rautbord v. Ehmann,* 190 F.2d 533 (7th Cir. 1951); *St. Hilaire Moye v. Henderson,* 496 F.2d 973 (8th Cir. 1974), *cert. den.* 419 U.S. 884 (1974); *Richards v. Blake Builders Supply, Inc.,* 528 F.2d 745 (4th Cir. 1975); and *In Re Young,* 872 F.2d 176 (6th Cir. 1989). Similarly, in *Coryell v. Phipps,* 317 U.S. 406 (1943) and *Just v. Chambers,* 312 U.S. 383, *reh. denied* 312 U.S. 713 (1941), this Court assumed without discussion that the Limitation Act would apply to pleasure craft while specifically deciding questions of the nature and scope of "privity and knowledge" under the Act.

An express ruling by this Court that admiralty jurisdiction must be independently established under the Limitation Act by satisfying the situs and nexus tests of *Executive Jet* and *Foremost* will conform with historical precedent as well as with the language of the Limitation Act itself. It will also promote the constitutional balance between the federal and state court systems. The federal trial courts will then be left with the appropriate task of deciding on a case-by-case basis whether specific matters properly fall within the federal admiralty jurisdiction.

C. *Richardson v. Harmon* Need Not Be Reconsidered, But Should Be Revisited And Clarified.

At the time *Richardson v. Harmon* was decided, admiralty tort jurisdiction depended solely on a navigable water situs. *See The Plymouth*. It was also well established that bridges and docks were extensions of the land and therefore presumptively beyond the territorial reach of admiralty. In *Richardson,* a commercial vessel struck a bridge and the shipowner invoked the Limitation Act. Although the bridge operator's claim against the vessel could not, itself, have established admiralty jurisdiction, the shipowner claimed the right to limit its liability against the bridge. In making that claim, the shipowner cited the 1884 amendment to the Act (now 46 U.S.C. § 189), which provides that the right to limitation shall extend to "any and all debts and liabilities". The shipowner argued that "any and all" debts and liabilities meant just that and, to give effect to the amendment, the Act must be deemed applicable to non-maritime as well as maritime torts. This Court agreed and upheld the right to seek limitation.

Petitioner Sisson and his supporting *Amicus* parties argue that the Seventh Circuit's decision is inconsistent with *Richardson* in applying the locality and nexus requirements to a limitation proceeding under the Act. In granting Sisson's Petition for *Certiorari,* this Court asked the parties to brief the issue of whether *Richardson* should now be reconsidered.

Amicus Hatteras submits that, if the *Richardson* decision is properly construed, it is unnecessary to reconsider and overrule it at this time. In fact, when Richardson is considered as part of the evolution of admiralty jurisdiction from situs alone to the additional requirement of a maritime nexus, the decision can be harmonized with the subsequent legislative expansion of admiralty jurisdiction (Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740) and later decisions of this Court. When so considered and clarified, *Richardson* maintains its narrowed precedential value.

At the time *Richardson* was decided, the "maritime locality" or "situs" requirement for admiralty jurisdiction meant that the wrongful act must have occurred and been consummated on navigable waters. *See In Re Phenix*. The *Richardson* Court was faced, however, with an amendment that seemingly extended the Act to allow limitation as to "any and all" debts and liabilities. Faced with the specific issue of the applicability of the amendment to the Act—rather than one of admiralty jurisdiction—this Court held that the amendment must be construed to allow limitation as to non-maritime as well as maritime torts.

The "situs" requirement was modified by the Extension of Admiralty Jurisdiction Act (46 U.S.C. § 740), however. In addition, this Court added the "nexus" requirement to sustain admiralty jurisdiction. *See Executive Jet.* If *Richardson* were to arise today, and this Court were squarely faced with the issue of jurisdiction, admiralty jurisdiction would unquestionably be established under *Executive Jet* and *Foremost.* The vessel in that case was commercial and the allision with the bridge, occurring on navigable waters, not only involved the traditional maritime activity of navigation, but impacted upon maritime commerce. The Seventh Circuit's decision below is consistent with this result.

The essential thread which harmonizes *Richardson, Sisson, Foremost,* and the Limitation Act is that once admiralty jurisdiction is shown to exist under the teachings of *Executive Jet* and *Foremost* (as more particularly defined by the Seventh Circuit in *Sisson),* the shipowner is able to invoke the provisions of the Limitation Act, including § 189, as well as the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F, principally), which allow for a "concursus" of claims to be filed in the federal court and a stay of all pending actions against the shipowner arising out of the occurrence giving rise to limitation. The injunctive order (Rule F(3)) and the monition notice

requiring claimants to file their claims and answers in the Limitation proceeding (Rule F(4) and (5)) apply pursuant to 46 U.S.C. § 189 (and *Richardson*), to *maritime* and *non-maritime* claims. This marshalling of claims, or "concursus", and the injunctive relief against other proceedings, is essential to the substantive rights of limitation under the Act. *See British Transport Commission v. United States,* 354 U.S. 129 (1957); *see also Jung Hyun Sook v. Great Pacific Shipping Co.,* 632 F.2d 100 (9th Cir. 1980). To obtain such remedial relief, however, a shipowner must affirmatively establish admiralty jurisdiction under the Act.

In summary, a decision by this Court which clearly establishes that a shipowner seeking the benefits of the Limitation Act must satisfy the situs and nexus tests of *Executive Jet*—and in the case of non-commercial vessels, the nexus standard of the Seventh Circuit in *Sisson*—will not require reconsideration of *Richardson v. Harmon,* but mere revisitation for purposes of explaining the evolution of admiralty jurisdiction. Viewed in that light, *Richardson* maintains its precedential value relating to the proposition that, once admiralty jurisdiction is established, the shipowner can limit liability as to all claims relating to the occurrence, both maritime and non-maritime in nature.

If, however, this Court concludes that *Richardson* inferentially held that the Limitation Act itself implicitly confers admiralty jurisdiction in a district court, then the decision ought to be reconsidered in light of the Extension of Admiralty Jurisdiction Act (which deems "maritime" those tort claims that were previously considered "non-maritime") as well as the decisions of this Court in *Executive Jet* and *Foremost.* The *Richardson* Court was forced to make a difficult decision: it either had to adhere to its decision in *In Re Phenix* and decline jurisdiction or give effect to the language of the amendment (now 46 U.S.C. § 189) and conclude that the shipowner could also limit its liability as to non-maritime claims. That dilemma would not be presented today, however, and this Court would therefore be free to consider directly the question of whether the Limitation Act provides an independent basis of liability.

CONCLUSION

Hatteras respectfully urges the Court to affirm the decision of the Court of Appeals on the grounds that it is consistent with this Court's decision in *Foremost* involving the scope of admiralty jurisdiction of a non-commercial recreational vessel seeking the benefits of the Limitation of Liability Act, and with the proper balancing of the respective interests of the states and federal judiciary.

Respectfully submitted,

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